***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

365

BRIEF FOR APPELLANTS AND JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 18,006



B. DOYLE MITCHELL
and
INDUSTRIAL BANK OF WASHINGTON,

*Appellants,*

v.

ROBERT L. EVANS, et al.,

*Appellees.*

No. 18,007

WADDELL R. THOMAS,

*Appellant,*

v.

ROBERT L. EVANS, et al.,

*Appellees.*

No. 18,008

ROBERT M. HARRIS,

*Appellant,*

v.

ROBERT L. EVANS, et al.,

*Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## QUESTIONS PRESENTED

The questions presented for adjudication in the court below and now before this Court, are:

(1) Do the allegations of the complaint meet the legal requirements of Rule 9(b) of the Federal Rules of Civil Procedure?

(2) Whether plaintiffs' within claim grew out of the transaction or occurrence which was the subject matter involved in Municipal Court Action No. 15174-59, and as such was a compulsory counterclaim which plaintiffs herein, as defendants in said Municipal Court suit, should have asserted at that time, and their failure to so assert said claim bars their within action?

(3) Whether an action at law can be maintained to recover compensatory and punitive damages resulting from a foreclosure of real estate by the trustee under the deed of trust securing a loan of money, where said trustee had the legal right to foreclose said property because of the breach of the terms of said deed of trust by default in payments on the note secured?

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APPEALS FROM THE UNITED STATES DISTRICT COURT
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## BRIEF FOR APPELLANTS

## JURISDICTIONAL STATEMENT

The appellants, Industrial Bank of Washington, B. Doyle Mitchell, Waddell R. Thomas and Robert M. Harris, defendants below, respectfully seek a review of their cases on appeal pursuant to Rules 73 and 75 of the

Federal Rules of Civil Procedure because of erroneous rulings by the court below denying motions of defendants on questions of law which are decisive of this case.

## STATEMENT OF CASE

On April 1, 1954 the appellees, Robert L. Evans and his wife, Lucille W. Evans, borrowed $14,000 from appellant Industrial Bank of Washington, and said appellees executed and delivered their joint and several promissory note in the amount of $14,000, bearing interest at the rate of 5% per annum, said principal and interest being payable in monthly installments of $110.00 beginning May 1, 1954, and a deed of trust, of even date, securing said loan as a first lien against appellees' real estate known as premises 1724 Seventh Street, N. W., in the District of Columbia, and said deed of trust was recorded among the land records of said District on April 1, 1954 in Liber 10166 at Folio 295; said deed of trust contained a provision that upon any default or failure being made in the payment of said promissory note or any installment of principal or interest thereon, then, upon any and every such default so made, the trustees or survivor of them, shall have the power and it shall be their or his duty thereafter to sell said land and premises at public auction; (Defendant Industrial Bank Exhibit No. 6, second page); that Jesse H. Mitchell and B. Doyle Mitchell were named as trustees under said deed of trust, both of whom were officers of said Bank; that thereafter said Jesse H. Mitchell died before October 1, 1957.

On October 1, 1957, the plaintiffs first defaulted on the monthly installment payments on their said promissory note, and from that date until December 1, 1958, which was the date of the foreclosure sale complained of, said appellees remained in continuous default under the terms of said deed of trust for a total of 13 consecutive months (J.A. 59).

In July, 1958, notwithstanding appellees continued default the appellant Bank, at the request of appellees, approved a loan of $13,500

to appellees to enable them to refinance said property and pay said delinquent payments (J.A. 60-62), but said refinancing transaction failed because of a tax lien against appellee Robert L. Evans (J.A. 41), which he could not satisfy in that time.

In November, 1958 the appellant, B. Doyle Mitchell, as surviving trustee under the deed of trust, instituted foreclosure proceedings against said real estate because of the default of appellees in their payments on said note (J.A. 33), and the foreclosure sale was had December 1, 1958 and appellant Waddell R. Thomas was the purchaser at said sale (J.A. 33); and subsequent thereto, with the consent of the trustee, the appellant Robert W. Harris was substituted as purchaser. The said foreclosure sale resulted in a financial deficiency of $1,518.35 against appellees on their said promissory note.

In May, 1959 the note holder, appellant Industrial Bank of Washington, filed a deficiency judgment suit against appellees in the Municipal Court for the District of Columbia (now the District of Columbia Court of General Sessions) Civil Action No. M 15174-59 (J.A. 33); appellees, as defendants in said Municipal Court suit, filed their answer to said suit, together with a cross-claim against the plaintiff therein, in which said answer the defendants therein alleged as a defense that said foreclosure sale was void because of an alleged conspiracy between said surviving trustee, B. Doyle Mitchell, and the within appellants, Waddell R. Thomas and Robert M. Harris, to manipulate said foreclosure sale whereby the title and ownership of said property would be in said B. Doyle Mitchell. (Answer of defendants in Municipal Court suit, J.A. 66). Defendants in said suit had judgment in their favor on their said defense and also judgment in their favor on their said crossclaim (J.A. 68) which said crossclaim judgment was paid and satisfied. No appeal was taken from said judgments.

The within suit is an action at law to recover damages resulting from said foreclosure sale; said suit being based upon the same alleged

conspiratorial fraudulent acts charged against the appellants as a defense in said Municipal Court Civil Action No. M 15174-59.

A jury in the court below in this case returned a verdict in favor of the appellees, and judgment was entered thereon and the case is now on appeal from the United States District Court for the District of Columbia.

## STATUTES AND RULES INVOLVED

**Federal Rules of Civil Procedure**

> **13(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, eff. March 19, 1948.
>
> **13(h) Additional Parties May Be Brought In.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.
>
> **15(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the

amended pleading, whichever period may be the longer, unless the court otherwise orders.

**District of Columbia Code, Title 11-755 (a)**

The Municipal Court for the District of Columbia, as established by sections 11-751 to 11-754 shall consist of a criminal and a civil branch. The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the Police Court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof on the effective date of this Act and in addition the said court shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3,000 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators and other fiduciaries: Provided, however, That the United States District Court for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction. The court shall also have jurisdiction over all cases properly pending in the Municipal Court of the District of Columbia or the Police Court of the District of Columbia on the effective date of this Act.

## STATEMENT OF POINTS

For purposes of clarity and brevity the parties in this appeal will hereafter generally be referred to as plaintiffs and defendants as in the court below; that where the Municipal Court is designated, or referred to, such designation or reference means: (now the District of Columbia Court of General Sessions) and since the defense of each of the defendants, including their respective answers, motions, trial procedures and contentions are practically the same, and since defendants' respective appeals have been consolidated on appeal, the following points, and brief to follow, are on behalf of each of the defendants:

1. The court below erred in granting plaintiffs' motion to strike defendants' compulsory counterclaim defense.

2. The court below erred in denying defendants' motion for leave to file an amended compulsory counterclaim defense.

3. The court below erred in denying defendants' motion to dismiss the complaint, or in the alternative for summary judgment.

4. The plaintiffs are not entitled to maintain this action at law for damages, and the court below erred in denying defendants' motion for a directed verdict.

## SUMMARY OF ARGUMENT

The defendants contend:

(1) That the plaintiffs' within claim was a compulsory counterclaim which grew out of the transaction or occurrence which was the subject matter involved in Municipal Court Action No. 15174-59 between the defendant Industrial Bank of Washington and plaintiffs herein, as defendants therein, and the failure of plaintiffs herein, as defendants in said Municipal Court suit, to assert said claim at that time bars the prosecution of said within claim under Rule 13(a) F.R.C.P.

2. That the allegations of the within complaint do not meet the legal requirements of Rule 9(b) F.R.C.P. and Peck v. Haley, 21 App. D.C. 224; Street v. Maddox, et al., 58 App. S.C. 42; therefore, defendants' motion to dismiss said complaint, or in the alternative for summary judgment, should have been granted.

3. That plaintiffs' within action at law to recover compensatory and punitive damages resulting from the foreclosure of real estate cannot be maintained because in order to maintain such action the foreclosure complained of must be void by reason of the lack of the legal right of the trustee to institute said foreclosure proceedings; if the trustee had the legal right to foreclose said property, an action at law for damages resulting therefrom cannot be mantained. The trustee in the case at bar had the legal right to foreclose said property.

## ARGUMENT

### I. Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure promulgated by the Supreme Court have the force of law, unless in contravention of Federal statutes, American Graphone Co. v. National Phonograph Co., 127 Fed. 349, 350; one of those rules is 13(a), which is the law on compulsory counterclaim and its provisions are mandatory. Penna. R. Co. v. Musante-Phillips, Inc., 42 F. Supp. 340, Hayden v. Yelton, 237 S.W. 2d 249.

#### A. Compulsory Counterclaim

Defendants' second defense in their answers to the complaint was to the effect that plaintiffs' failure to assert their within cause of action as a compulsory counterclaim in a prior suit in the Municipal Court of the District of Columbia, No. M 15174-59, between the defendant Industrial Bank of Washington and the plaintiffs herein, as defendants therein, barred prosecution of this suit.

A compulsory counterclaim has been judicially defined as a claim which a party has against an opposing party which (a) was not the subject of another pending action, (b) that said claim existed at the time of the filing of the opposing pleading in the prior action between the parties, (c) that the claim arose out of the transaction or occurrence that was the subject matter of the opposing party's claim, and (d) that no third party's presence of which the court could not have acquired jurisdiction was necessary for its jurisdiction. Brinkman v. Common School District No. 27, 238 S.W. 2d 1.

Plaintiffs' complaint is based upon facts which grew out of the transaction or occurrence that was the subject matter of the prior action between the defendant Industrial Bank of Washington and plaintiffs, as defendants, in said Municipal Court Action No. M 15174-59. The court could have acquired jurisdiction over the defendants, B. Doyle Mitchell (Mitchell's affidavit, JA 20), Waddell R. Thomas and Robert M. Harris

(Harris' affidavit, JA 23), and under the foregoing judicial definition plaintiffs' said claim constituted a compulsory counterclaim under Rule 13(a) F.R.C.P. and the same should have been asserted as such at that time against all of the defendants herein, Rule 13(h) F.R.C.P., and plaintiffs' failure to so assert said claim the within action based thereon is barred. Flowers v. Magor Car Corporation, 26 F.2d 98, 99. Failure to assert a compulsory counterclaim precludes its later assertion as to any party against whom it should have been interposed before. Reconstruction Finance Corp. v. First National Bank of Cody, 21 F.R. Serv. 13a. 3, Case 1.

B. Jurisdiction of Compulsory Counterclaim With Respect to the Amount of Money Involved

Under Rule 13(a) F.R.C.P. it has been consistently and uniformly held that if the court has jurisdiction over the main action, that a compulsory counterclaim being ancillary or auxiliary to the main claim needs no independent jurisdictional grounds to support it, regardless of the amount in controversy in the counterclaim. Arvey Corp. v. Peterson, 138 F. Supp. 132; N. Y. Life Insurance Co. v. Kauffman, 32 F.2d 398.

Plaintiffs say that this rule is not applicable in this case because said Municipal Court, under its Rule 13(a) did not have jurisdiction over compulsory counterclaim in excess of $3,000; that their claim being in excess of that amount, said Municipal Court did not have jurisdiction over their said claim, and for that reason they were not required to file said claim as a compulsory counterclaim. Citing and relying upon Hillyard v. Klein, D. C. Mun. App., 64 A.2d 759.

Plaintiffs' contention and their stated reason in support thereof, are demonstrably erroneous. Let us assume the following example, which frequently occurs:

> A and B enter into a contract for the sale of certain real estate and B, the purchaser, pays a deposit of $3,500 on the contract. Disputes later

> develop between the parties; each of them charging the other with breach of contract and the sale is not finally consummated. A, the seller, files suit in the Municipal Court against B, the buyer, to recover $3000 damages for breach of contract. B answers, and files a counterclaim to recover his deposit of $3500.

Under plaintiffs' theory and contention B must be denied his right to maintain his counterclaim because it is in excess of the counterclaim jurisdiction of the Municipal Court (this before the recent removal of monetary limitation of counterclaims filed in the District of Columbia Court of General Sessions); the result: The purpose of Rule 13(a) F.R.C.P. has been defeated, and if B waits until after judgment is entered in the Municipal Court suit to file his claim in the United States District Court for the District of Columbia he is met with the successful defense of res judicata; thus B is judicially helpless to assert his claim; and further, and much more important, if plaintiffs' contention is correct, then the result is that a "no man's land" exists in the judicial process in the District of Columbia with respect to the assertion of compulsory counterclaims in cases in the Municipal Court which exceed its $3000 jurisdictional limitation over such counterclaims. In view of the importance of the Federal Rules of Civil Procedure, one of which is Rule 13(a), it is incredible that such a "no man's land" would be permitted to exist. The legal fact is, however, that no such "no man's land" exists in the judicial process in the District of Columbia with respect to assertion of compulsory counterclaims in cases in the Municipal Court which exceed that court's jurisdiction. T. 11-755(a) of the District of Columbia Code (1961), with respect to counterclaims, provides:

> "that the Municipal Court shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys fees, protest fees, and costs, does not exceed the sum of $3000, * * *: Provided, however, that the United States District Court for the

> District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction" (underscoring supplied).

The statute says the United States District Court for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction. (underscoring supplied). Interposed in what actions over which it has jurisdiction? Obviously, the statute means that the United States District Court for the District of Columbia shall have jurisdiction over all counterclaims and crossclaims in excess of $3000 interposed in actions in the Municipal Court over which the Municipal Court has jurisdiction over the main claim. This construction of the statute could not be otherwise because there would be no need of the "Provided" section since the United States District Court for the District of Columbia already had jurisdiction of all civil cases where the sum in controversy was $3000 or more. This construction would seem to have been approved in Smith v. Leigh, 101 U.S. App. D.C. 225, and Rollins v. District of Columbia, 105 U.S. App. D.C. 155. All of which means that the United States District Court for the District of Columbia had jurisdiction over plaintiffs' said claim as a compulsory counterclaim. Judgment was entered in said Municipal Court suit February 8, 1961 and no appeal was taken from that judgment. The within suit was filed in the United States District Court for the District of Columbia March 10, 1961, and the failure of plaintiffs to file their within claim as a compulsory counterclaim in the United States District Court for the District of Columbia before judgment was entered in said Municipal Court suit No. M 15174-59, plaintiffs' said within claim is now barred from prosecution.

Plaintiffs have not denied, or raised any issue, that their within claim was a compulsory counterclaim which, as such, should have been asserted at the time of said Municipal Court suit; all they say with respect to this point is that they did not have to assert said claim as a

compulsory counterclaim because said Municipal Court did not have jurisdiction over said counterclaim.

In Biaett v. Phoenix Title & Trust Co., 217 P.2d 923, 22 A.L.R. 2d 615, where there was a similar issue of failure to assert a compulsory counterclaim in a prior suit between the parties, the court said: "If the appellant had any doubt as to the nature of his counterclaim, whether permissive or compulsory, a careful practice requires that he should have pleaded it at that time." The comment of the court in that case seems to be pertinent herein.

## II. Denial of Defendants' Motions for Leave to Amend Pleadings — Rule 15(a) F.R.C.P.

The objective of Rule 15(a) F.R.C.P. is the disposition of litigation on the merits. 3 Moore's Federal Practice 804.

After plaintiffs' motion to strike defendants' second defense of compulsory counterclaim had been granted, defendants moved for leave to file amended answers. (Proposed amended answer of defendant Industrial Bank, JA 30; Proposed amended answer of defendant Mitchell, JA 30; Proposed amended answer of defendant Thomas, JA 28; Proposed amended answer of defendant Harris, JA 26.) Defendants' said motions were denied. (Order dated August 16, 1961, JA 31)

Because the Order of August 16, 1961 denying leave to defendants to amend their answers is silent on what ground said denial was based (JA 31), defendants' opposition to said Order denying them leave to amend their pleadings is based upon the general principles of Rule 15(a) governing the right to amend pleadings, as follows:

### A. Liberality

In Conley v. Gibson, 355 U.S. 41, the court said:

> "The Federal Rules of Civil Procedure reject the approach that pleading is a game of skills in which one misstep by counsel may be decisive of

> the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

In Archibold v. McLaughlin, 181 F. Supp. 175, the court states the principle: "the practice is to permit amendments freely to cure defective or imperfect pleadings, particularly to remedy objections raised on motions to dismiss." Where it is in furtherance of justice, great liberality is desired on granting the right to amend. Hirshorn v. Mines Safety Appliances Co., 101 F. Supp. 549. In Hall v. Gordon, 76 U.S. App. D.C. 33, the defendant Gordon, at the trial of the case, was permitted by the trial court to amend his answer to assert an additional defense that he had acted on the advice of counsel. On appeal appellant Hall claimed it was error to permit Gordon to amend his answer by asserting a new defense at the trial. This court held there was no error in permitting Gordon to amend his answer at the trial.

B. Discretion

Leave to a party to amend pleadings is within the discretion of the court and should be freely granted when justice so requires. Ziegler v. Akin, 261 F.2d 88; the discretion to be exercised on leave to amend pleadings means that both parties should be considered on an application to amend. Friedman v. Transamerica Corp., 9 F.R. Serv., 15a. 21. Case 2, Cantey v. McLane Line, Inc., 40 F. Supp. 887.

C. Prejudice

The most important factor in determining whether a motion for leave to amend pleadings should be permitted is whether any prejudice will result to the opposition. Wildow v. Edgemoore Realty Co., 81 F. Supp. 800; Ziegler v. Akin, 251 F.2d 88. To warrant denial of a motion to amend it must be shown that to allow amendment it will result in prejudice to the opposite party. W. C. Shepherd Co. v. Royal Indemnity Co., 192 F.2d 710.

The plaintiffs in their opposition to defendants' motion for leave to amend their pleadings did not assign prejudice to them as a ground in their opposition for leave to amend defendants' pleadings.

D. Abuse of Discretion

In Busam Motor Sales v. Ford Motor Co., 203 F.2d 469, it was said the trial court abused its discretion in denying plaintiff's motion to amend a complaint which had originally alleged bad faith in the termination of a contract, so as to allege bad faith in the execution thereof; and in Kirk v. United States, 232 F.2d 763, it was held it was an abuse of discretion to deny a plaintiff leave to amend his complaint where the court had indicated it would grant defendant's motion for summary judgment and plaintiff sought to amend to conform to defendant's version of the facts.

In the present case if the court below denied defendants' leave to amend their pleadings as a matter of law, this court may reverse if the district court was wrong on the law. Sheridan-Wyoming Coal Co., Inc. v. Krug, 84 U.S. App. D.C. 288.

## III. Defendants' Motion to Dismiss the Complaint, or in the Alternative for Summary Judgment

We strongly urge that the case should not have gotten to the trial stage. Defendants' Motion to Dismiss or in the Alternative for Summary Judgment should have been granted. The arguments made before the trial court on this motion may in part appropriately be here set forth.

The lack of specificity and particularity in the instant case is a violation of the Federal Rules of Civil Procedure and of the interpretation thereof by this Court. Rule 9 of the Federal Rules provides:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

This court in Peck v. Haley, 21 App. D.C. 237, uses the language: "The facts which constitute the fraud or excuse the delay must be specifically stated." Again, in Street v. Maddux Marshall, Moss & Madlory, Inc., 58 App. D.C. 42, this Court held:

> "An allegation that a party is guilty of fraud amounts to nothing more than a statement of a conclusion of law, and gives to the adverse party no information whatever as to the facts upon which that conclusion is based. Marquez v. Finsbie, 101 U.S. 473, 25 L. Ed. 800."

A. Motion to Dismiss

Plaintiffs herein, as defendants in said Municipal Court Civil Action No. 15174-59, as a defense in said suit named and charged all of the defendants herein with duplicity and conspiratorial fraud in dealing with said real estate. Plaintiffs, as defendants in said Municipal Court suit, won that case on the issues therein raised; judgment was so entered. Plaintiffs' within complaint alleges, and is based upon, the same facts they put in issue as a defense in said Municipal Court action and the same are res judicata. Great Atlantic & Pacific Tea Co. v. West, 56 App. D.C. 103; Broder Accident & Indemnity Co., 106 F. Supp. 343; Reconstruction Finance Corp. v. First National Bank of Cody, 21 F.R. Serv. 13a. 3, Case 1.

The complaint is allegedly based upon the violation by the defendant trustee of his agreement with the plaintiffs, but said complaint does not state what said agreement was or what terms of said agreement the defendant trustee violated, therefore the allegation is too vague as to what agreement the defendant is charged with violating. If the "agreement" referred to by plaintiffs was the agreement by the defendant Bank to refinance the property so that plaintiffs could get the money to pay their defaulted delinquencies, then in that case, the Bank kept its said agreement by making available to plaintiffs for this purpose $13,500, but said refinancing transaction failed because of a tax lien against

appellee Robert L. Evans which he could not satisfy at that time. The result was that immediately upon failure of said refinancing transaction because of plaintiffs' inability to complete the same, said trustee again had the immediate legal right to foreclose said property.

The allegation by the plaintiffs that the defendant B. Doyle Mitchell, as a trustee, bought in the property in the name of Robert Harris when as a matter of fact he, B. Doyle Mitchell, is the actual owner is by no means conceded but is on the contrary specifically denied. However, even if this were a fact the plaintiffs could not ask either for the relief here sought, for which under these circumstances there is no precedent which we have been able to find, nor could they ask for relief to which they might otherwise be entitled unless and until there was a showing on their part that they themselves had made some tender of the amounts admittedly due by them in the nature of some eleven months of default of monthly payments. The plaintiffs do not allege that they were not in default under their obligation to defendant bank; they do not allege that they ever attempted to pay off the obligation and obtain a release of the deed of trust; they do not allege that they had no knowledge of the identity or whereabouts of the holder of their note, nor do they allege any material impropriety in the manner of the foreclosure sale or any lack of knowledge on their part of the time and place of the foreclosure sale.

The complaint alleges that the plaintiffs were damaged but it does not allege any pecuniary or other losses by the plaintiffs. Moreover, although the complaint alleges that defendants "wickedly" and "fraudulently" conspired to deprive plaintiffs of their property, it fails to allege any fraudulent representation, any reliance by plaintiffs on representations made, any action by plaintiffs or refraining from taking action in reliance on representations made resulting in a change of position to their disadvantage economically or otherwise.

The complaint does not state a cause of action for damages for the tort of fraud or deceit. No actual compensatory damages are alleged. And no basis for nominal damages is set forth.

If the "agreement" referred to by plaintiffs was the alleged agreement on the part of the surviving trustee to withhold foreclosure action until the plaintiffs would remove the liens which had prevented their acceptance of the refinancing proposition afforded them, such an agreement was void and unenforceable.

The complaint shows on its face that the plaintiffs were parties to an agreement with the defendant trustee, which said agreement required the trustees to breach his contractual fiduciary relationship with the defendant Bank, the party secured under the deed of trust; and said complaint also shows that plaintiffs, being parties to such agreement, their hands are not clean and they are not entitled to rely upon said agreement.

Notwithstanding said complaint alleges a conspiracy between the defendants, a cause of action is not created by the conspiracy, but by the wrongful acts done by the defendants to the injury of the plaintiffs. De Bobula v. Goss, et al., 90 U.S. App. D.C. 29. The alleged wrongful act done by the defendants was the breach of an agreement, the performance of which required the trustee to violate the trust reposed in him by lender of the money secured under the deed of trust.

A contract which has for an integral part of its consideration the breach of a prior inconsistent contract between one of the contracting parties and a stranger is based upon an illegal consideration and is void. Reiner v. N. A. Newspaper Alliance, 259 N. Y. 250, 181 N. E. 561; Weegham v. Killifer, 215 F. 289; Wald's Pollock on Contracts (3 Am. Ed.) 376.

The complaint shows on its face that said conspiracy is based upon the violation of an agreement to delay said foreclosure proceedings and which was made after the trustee's legal right to foreclose said property already existed. Said agreement was worthless for that purpose. Sandler v. Green, 192 N. E. 39, 41; and further said suit is an action at law to recover damages for a wrongful foreclosure of real estate and the

complaint shows on its face that said foreclosure was rightful because of the defaults of plaintiffs under the terms of said deed of trust. Such an action cannot be maintained at law. Peterson v. Kansas City Life Insurance Company, 108 A.L.R. 583.

B. Summary Judgment

The complaint charges a conspiracy to defraud against the defendants. Fraud is a question of fact, and defendants concede that summary judgment will not be granted where there is a material question of fact in issue. Dewey v. Clark, 86 U.S. App. D.C. 137.

However, under an attack of summary judgment a complaint alleging issues of fact the first point for determination is the legal sufficiency of the complaint to assert the claim therein contained, and if said complaint is found to be legally insufficient to support the claim the question of material facts being in issue is not reached. Biaett v. Phoenix Title & Trust Co., 22 A.L.R. 615, 217 P.2d 923. Illustrative of the application of this rule of law are cases against the sovereign which has not consented to be sued; cases where the court does not have jurisdiction and cases founded upon transactions which are against public policy. It has been consistently held in such cases that, under a motion to dismiss or for summary judgment, said actions could not be maintained, on the ground of legal insufficiency of the complaint to support the claim for relief, notwithstanding said complaint alleged genuine material issues of fact.

Assuming that plaintiffs' complaint does set forth a cause of action for the relief sought — which we vigorously deny — we contend that on the undisputed facts as they appear from the pleadings and affidavits on record in this cause the defendants are entitled to summary judgment in their favor.

The plaintiffs are obligors on a note secured by a deed of trust to the defendant Mitchell as trustee and seek a judgment for actual and

punitive damages. The essential alleged basis for the action is the purchase by the trustee at the foreclosure sale. It affirmatively appears that the plaintiffs at the time of the foreclosure sale were 11 months in arrears on their monthly obligations; that at no time did they offer to pay the delinquent installments so as to bring their account up to date or to pay the balance due on the note and redeem the security property. Moreover, it affirmatively appears that the defendants never interferred with the opportunity of the plaintiffs to pay up or to redeem the security property and that plaintiffs had every opportunity to appear at the foreclosure sale and to protect their own interest. As a matter of fact the defendant Bank in an attempt to be of assistance to the plaintiffs arranged to refinance the property so as to avoid foreclosure and was defeated in the attempt so to do only because of outstanding tax liens against the plaintiffs.

More specifically, the Court should grant the motion of the defendants Mitchell and Industrial Bank for the following reasons:

1. The plaintiffs have no right to recover damages for fraud or deceit.

It affirmatively appears from the pleadings and affidavits that the plaintiffs were not induced by any word or act of the defendants or either of them either to act or refrain from acting to their detriment. It is a fair inference from the failure of these plaintiffs either to pay off the secured debt or tender payment that they were unable to do so. The simple fact of the matter is that the foreclosure sale came about as a result of the failure of plaintiffs to pay the secured debt as they had promised to do.

It is undisputed that in fact the plaintiffs were not defrauded, and that therefore, they have no right to recover from these defendants.

Moreover, it affirmatively appears that plaintiffs have not sustained any loss as a result of this particular foreclosure sale. Assuming without conceding that the defendant Harris holds the title of the foreclosure

property as a straw for defendant Mitchell, then the property may be redeemed upon payment of the secured obligation. This the plaintiffs have consciously elected not to do. So that this election is the cause of their loss, if any, and said loss, if any, was not caused by the foreclosure nor is there any occasion to have to deal with intervening bona fide purchasers or encumbrances.

2. It affirmatively appears that the plaintiffs are not entitled to any form of equitable relief because they do not come into court with clean hands.

At the time of the foreclosure sale herein complained of the plaintiffs were some eleven months in arrears in their promised monthly installments on the secured obligation to the defendant Bank. It also affirmatively appears that they have never made a tender of payment in whole or in part.

It also is a fair inference from the undisputed facts that the effective cause of the present complaint is the bringing of the Municipal Court action by the Bank to recover a judgment for the deficiency against these plaintiffs as the makers of a promissory note. It follows necessarily that they are not entitled to the remedies which an equity court could grant.

3. On the undisputed facts these plaintiffs have no right to recover punitive damages because no "willful tort" has occurred.

Assuming that the defendant Mitchell indirectly purchased the security property, this is not a willful tort within the meaning of the rule as laid down by the courts. There is no actual fraud. The sale of the property was pursuant to a power of sale contained in the deed of trust and was not in and of itself nor by virtue of any attendant circumstances a tortious act.

In a proper case, where the obligors are ready, willing and able to do equity, the equity remedies are entirely adequate to protect the equity owners.

In addition the sanctions of the criminal law are always available to punish persons who actually steal or embezzle funds while acting in a fiduciary capacity.

There is another and further reason why a trustee of security property should not be held liable for punitive damages in such situations. This reason is grounded in the public interest and in the needs of the business community. To permit actions of this sort to be maintained would impair the usefulness of the deed of trust as a security device by discouraging many reputable businessmen from acting as trustees. The Court review of foreclosure sales by equity courts provides a sufficient protection to the public without subjecting all trustees to the possibility of harassment by suits for punitive damages.

We respectfully set forth that there has been a total failure to set forth a cause of action upon which relief could be granted and that where, as here, factual issues purport to have been created by allegations of fraud, the failure to state an original cause of action should have resulted in the granting of this alternative Motion to Dismiss or for Summary Judgment.

## IV. Plaintiffs Are Not Entitled to Maintain This Action at Law for Damages

### A. Directed Verdict

The general rule in cases seeking relief based upon foreclosure of real estate raises the alternative questions: (a) whether the foreclosure was wrongful, or (b) whether it was a rightful foreclosure improperly executed? The difference between the alternative questions is fundamentally one of fact, which is determinative of the procedure and the remedial nature of the relief which may be granted. A wrongful foreclosure is one where the trustee did not have the legal right under the terms of the deed of trust to institute the foreclosure proceedings. In cases of wrongful foreclosure the cestui que borrower may, at his

election, maintain an action at law for damages, or, he may elect to proceed for equitable relief, e.g., to have the sale set aside, or for an accounting or other equitable relief. Royal v. Yudelevit, et al., 106 U.S. App. D.C. 1. Citing with approval Peterson v. Kansas City Life Insurance Company, 108 ALR 583. A rightful foreclosure improperly executed is one where the trustee had the legal right under the terms of the deed of trust to commence the foreclosure, and subsequently some irregularity occurs in the proceedings. In such cases the procedure and remedy is for equitable relief only.

At the trial plaintiffs finally elected to proceed under the theory that the foreclosure was a rightful one improperly executed (J.A. 45-58).

In every case involving foreclosure of real estate the borrower of the money, before he files his suit, is in possession of the entire facts pertaining to the case, and he has the choice of electing the procedure and remedy he will pursue; subject, however, to the limitation that the facts in the particular case must support the procedure and remedy he elects. If the facts, upon which the cestui que borrower made his election, show that the trustee had the legal right to institute the foreclosure, but gross irregularities subsequently occurred in the proceedings, the cestui is limited to equitable relief and he cannot maintain an action at law for damages, compensatory and punitive, no matter how flagrant said irregularities were; in such cases his procedure and remedy is for equitable relief. Holman v. Ryon, 61 App. D.C. 10, 56 F. 2d 307; Spruill v. Ballard, 61 App. D.C. 112, 58 F. 2d 517.

Peterson v. Kansas City Life Insurance Company, 108 A.L.R. 583, 98 S.W. (2d) 770, clearly sets forth the distinction between a wrongful foreclosure and a rightful foreclosure improperly executed, together with the rules of law applicable to each. Defendants herein strongly rely upon the Peterson case in support of their contentions. In that case Peterson borrowed $30,000 from Kansas City Life Insurance Company and the loan was secured as a first lien against a building owned by the borrower.

Upon subsequent default in payment the trustee advertised the property for sale at public auction and it was bought by the note-holder, Insurance Company, for $18,000, which was the only bid made at the sale. Peterson, claiming that the trustee's advertisement was defective, sued Kansas City Life Insurance Company in an action at law for compensatory and punitive damages on the ground that said foreclosure was wrongful. Plaintiff had a verdict for $46,000 actual damages and $20,000 punitive damages. When plaintiff refused to remit all damages in excess of $7,500, the court granted defendant's motion for a new trial, which action was sustained on appeal. Following are some pertinent quotes from the court's opinion at page 587-588:

> "The fatal defect in plaintiff's case is that, while she seeks to recover damages on the theory that she lost her equity of redemption in the land by a wrongful foreclosure by the mortgagee, her proof shows that the defendant had a right to foreclose under the terms of the trust deed because of her defaults. A mortgagee's act of commencing a foreclosure cannot be wrongful when there is a clear right to foreclose. * * * The most that plaintiff's evidence tends to show is not a wrongful foreclosure by the mortgagee, but only an improper execution of a rightful foreclosure."

again at page 588:

> "Plaintiff cites no case which holds, at least in the absence of a preconceived plan to carry out a fraudulent purpose, a mere improper execution of a rightful foreclosure is ground for any relief by the mortgagor against the mortgagee except in equity. We have searched for such cases and have found none. On the contrary, every such case we have examined, sustaining recovery at law for damages by the mortgagor against the mortgagee, has been a case in which the foreclosure was absolutely void because the mortgagee had no right to foreclose at the time he attempted foreclosure."

at page 589-590:

> "When the mortgagee has the right to foreclose, the foreclosure sale passes the legal title. An improper execution of the power of sale may be sufficient ground

> for a court of equity to set the sale aside. But, until it is set aside, it stands as a valid legal transfer of the title and the mortgagor ought to be barred from claiming damages at law because of the transaction as long as he permits it to stand as a legal conveyance of his title. For him to allow it to stand and bring an action at law, because of it, is in the nature of a collateral attack upon its validity. Such a sale may be voidable in equity but it is not void at law. * * * "

In cases where the charge is a preconceived plan to carry out a fraudulent purpose, the acts constituting the fraud must be such as to nullify the right to foreclose, as in Spruill v. Ballard, 61 App. D.C. 112; but if said acts did not nullify the right of the trustee to foreclose, an action at law for damages cannot be maintained. Ballard v. Spruill, 64 App. D.C. 60.

In the case at bar the plaintiffs purport to base their complaint on (a) the violation by the trustee of his agreement to refinance and (b) the breach of the agreement to delay foreclosure proceedings until appellee Robert L. Evans satisfied an income tax lien against him (Tr. 52). With respect to agreements of this nature, in Sandler v. Green, 281 Mass. 404, 192 N.E. 39, 41, the defendant had offered to accept a certain amount for all delinquencies which was tendered, but the plaintiff refused to accept new conditions imposed and the defendant foreclosed. After foreclosure the plaintiff sued defendant at law for damages for wrongful foreclosure. There was a directed verdict for defendant. In holding the directed verdict was proper, the court said:

> "The sale by the defendant was within the terms of the power. The unaccepted tender did not, itself, cure the previous breach nor at law extinguish or delay the right of the mortgagee to execute the power. * * * The negotiations between the parties * * * did not have the effect of extending the time for performance of the condition. The breach had already occurred."

In the case at bar, at the time defendants made their motion for a directed verdict, the posture of the case was: (a) plaintiffs' suit is an

action at law for damages, compensatory and punitive, resulting from a wrongful foreclosure of plaintiffs' property by the trustee under the terms of the deed of trust; (b) that at the time the foreclosure proceeding was commenced the plaintiffs were 13 consecutive months in default (J.A. 59); (c) plaintiffs had elected to try the case on the theory of a rightful foreclosure improperly executed (J.A. 44-58).

Under the foregoing and undisputed facts plaintiffs could not maintain their action at law for damages resulting from a wrongful foreclosure of the property; nor could plaintiffs maintain said action at law on the theory of a rightful foreclosure improperly executed, because the undisputed facts showed that the trustee had the legal right to institute said foreclosure proceedings because of the default of plaintiffs; the most favorable view of the facts in favor of plaintiffs was that said foreclosure was a rightful one improperly executed and their remedy, if any, was equitable relief.

In view of the undisputed and proven facts in this case and the law applicable thereto, the court below erred in denying defendants' motions for a directed verdict.

## CONCLUSION

It is respectfully submitted that the judgment entered by the United States District Court for the District of Columbia is error and should be reversed, and that the judgment of the trial court should be for defendants.

GEORGE E. C. HAYES
GEORGE H. WINDSOR
JULIAN R. DUGAS

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B. Doyle Mitchell
and
Industrial Bank of Washington

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**Attorney for Appellant,**
Robert M. Harris

BELFORD V. LAWSON, JR.

1725 K Street, N. W.
Washington, D. C.

**Attorney for Appellant,**
Waddell R. Thomas

INDEX

# JOINT APPENDIX

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[Filed Mar. 10, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT L. EVANS,
LUCILLE W. EVANS,
Both of 1300 Somerset Place, N.W.
Washington, D. C.,

Plaintiffs,

-v-

Civil Action No. 748-61

B. DOYLE MITCHELL
c/o Industrial Bank of Washington
11th & U Streets, N.W.

THE INDUSTRIAL BANK OF
WASHINGTON, A Corporation
11th & U Streets, N.W.

WADDELL R. THOMAS
1713 North Capitol Street

ROBERT M. HARRIS
c/o Southern Aid Life Insurance
Company, 1903 Seventh Street, N.W.
All of Washington, D. C.,

Defendants.

## COMPLAINT

### (DAMAGES FOR CONSPIRACY IN DEALING WITH TRUST PROPERTY FOR TRUSTEES PERSONAL BENEFIT)

The complaint of Robert L. Evans and Lucille W. Evans respectfully represents unto the Court as follows:

1. That jurisdiction for this cause is based upon the fact that the amount involved in this controversy exceeds three thousand ($3,000.00) dollars.

2. That the plaintiffs are husband and wife, citizens of the United States and residents of the District of Columbia, and file this suit in their own right as will more fully hereinafter appear.

3. That the defendant, B. Doyle Mitchell, is the President of the Industrial Bank of Washington, a member of its Board of Directors, and issued in his individual capacity and as agent, servant and/or employee of the defendant, The Industrial Bank of Washington, a corporation and that the aforesaid B. Doyle Mitchell is also a licensed real estate broker in the District of Columbia; that the Industrial Bank of Washington, a corporation is a corporation organized and doing business in the District of Columbia; that the defendant, Waddell R. Thomas, is a licensed real estate broker in the District of Columbia; and the defendant, Robert M. Harris, is a citizen of the United States and a resident of the District of Columbia, is an executive of an insurance company; that all of the last three (3) named defendants are sued in their own right as will more fully hereinafter appear.

4. That on to wit, the 1st day of April, 1954, and for some considerable time prior thereto, the plaintiffs were the record and beneficial owners of a certain parcel of land in the District of Columbia, known and described as Lot 832 in Square 419, improved by a certain premises known and described as 1724 Seventh Street, N.W.; that said property was a valuable piece of commercial property valued at Forty Thousand ($40,000.00) Dollars, and was being used as investment property, with a store and dwelling units combined; that the plaintiffs did seek and obtain a loan from the defendant corporation in the amount of thirteen thousand five hundred ($13,500.00) dollars, secured by a prior deed of trust, in which one Jesse Mitchell and B. Doyle Mitchell, the defendant herein, were named as trustees, said deed of trust having been duly recorded on the 1st day of April, 1954, and recorded among the land records of the District of Columbia; that thereafter the trustee, Jesse Mitchell, departed this life, leaving as the sole surviving trustee, the defendant, B. Doyle Mitchell.

5. That upon the execution of the deed of tust referred to supra, it then and there became the duty of the trustees to faithfully execute their trust and to scrupulously protect the interests of both the lender and the borrowers; that after the demise of the co-trustee, Jessee Mitchell, the full duty of the trusteeship devolved upon the surviving trustee to faithfully execute the trust in him reposed, to scrupulously protect the interests of both the lender and the borrowers, and under no circumstances traffic in the trust property for the trustee's own personal benefit.

6. That notwithstanding the duty imposed upon him as trustee the defendant, B. Doyle Mitchell, did collude, conspire, contrive and combine wickedly and fraudulently with the defendants Waddell R. Thomas and Robert M. Harris, with the full knowledge and acquiescence of the defendant corporation The Industrial Bank of Washington, for whose interest the aforesaid B. Doyle Mitchell pretended to act in the incipiency to get control of, and ownership of the property described in this complaint for his own personal use and profit.

7. That in furtherance of the scheme of the conspiracy described above the defendant, B. Doyle Mitchell, acting in his capacity as surviving trustee under the terms of the deed of trust referred to in paragraph 4 of this complaint, did in violation of his agreement with the plaintiffs expose the plaintiffs' property to foreclosure on the 1st day of December, 1959 and did, in furtherance of a preconceived scheme and conspiracy purport to sell the property to one Waddell R. Thomas, a defendant herein, in violation of the published terms of said sale and without a deposit; that the alleged sale to the defendant was not a bona fide sale, but was a device or scheme whereby the defendant, B. Doyle Mitchell, was in fact and in truth acting for himself in violation of his obligations as trustee and in violation fo law; that thereafter the defendant, B. Doyle Mitchell caused the plaintiffs property to be deeded to Waddell R. Thomas, in fee simple, without the aforesaid Waddell Thomas investing a solitary penny; that thereafter the defendant, B. Doyle Mitchell, still conspiring with the defendant, Waddell Thomas, wickedly and fraudulently colluded and conspired with the defendant, Robert M. Harris, and

caused the aforesaid defendant, Robert M. Harris to be substituted as owner of the plaintiffs' property in place and stead of the defendant, Waddell Thomas, who refused even to pay the settlement charges incurred as a result of his purchase of the property, insisting that the defendant, The Industrial Bank of Washington, a corporation, should assume said charges, which the defendant, B. Doyle Mitchell, acting for the defendant bank, permitted the defendant Bank to assume; that the transfer to Robert M. Harris, was a scheme and deceptive device used by the defendant Mitchell, to fraudulently cloak his (Mitchell's) real interest in the property; that defendant, Robert M. Harris, was and is the agent, tool and straw of the defendant, B. Doyle Mitchell, who has since his acquisition of said property expended large sums of his (Mitchell's) personal money in said property under the guise and pretext of loans to the defendant, Robert M. Harris, who is and was, financially embarrassed and who has never invested a penny of his own money in the property; that the defendant, B. Doyle Mitchell, has consistently demonstrated his own personal and financial interest in the property described supra in this complaint, by collecting rents, contracting utilities in his own name and by the ostensible advancement of huge sums of money to the notoriously impecunious co-defendant, Robert M. Harris; that the property described supra, is in fact the property of the defendant, B. Doyle Mitchell.

8. That thereafter in furtherance of the scheme to harass and annoy the plaintiffs, the defendant, B. Doyle Mitchell, caused the defendant corporation, The Industrial Bank of Washington, to institute a suit in the Municipal Court for the District of Columbia, the same being Civil Action #M15174-59 against these plaintiffs claiming an alleged deficiency in the amount of One Thousand Five Hundred Eighteen Dollars and Ninety Cents ($1,158.90) that after a protracted trial that cause was resolved against the defendant Bank, and during the course of said trial all of the disclosures enumerated in this complaint were revealed; said cause is hereby incorporated herein by reference.

9. That as a result of the defendants manipulations of the trust property by the surviving trustee, the defendant, B. Doyle Mitchell for

his own benefit, the plaintiffs have been greatly damaged.

WHEREFORE, the plaintiffs bring this suit and claim judgment against the defendants and each of them, in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars as damages, both actual and punitive, besides costs.

/s/ Robert L. Evans
/s/ Lucille W. Evans

JURY DEMAND

The plaintiffs demand a jury trial in this cause.

/s/ Thurman L. Dodson
Attorney for Plaintifffs

/s/ Thurman L. Dodson

Attorney for Plaintiffs
626 Third Street, N.W.
DIstrict 7-8000

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[Filed April 6, 1961]

ANSWER OF DEFENDANT, B. DOYLE MITCHELL

Comes now the defendant, B. Doyle Mitchell, and for answer to the complaint or to so much thereof as he is advised that it is material for him to answer, answering says:

FIRST DEFENSE

The complaint fails to state a cause of action against this defendant upon which relief can be granted.

SECOND DEFENSE

This defendant asserts that the claim set forth in the said complaint is barred as to this defendant in that in Civil Action No. M 15174-59 in the Municipal Court for the District of Columbia the Industrial Bank of Washington as plaintiff in that said cause captioned INDUSTRIAL

BANK OF WASHINGTON, Plaintiff vs. ROBERT L. EVANS AND LUCILLE W. EVANS, Defendants, undertook to obtain against the said defendants a deficiency judgment growing out of a foreclosure sale of premises 1724 7th Street, N.W., in which said cause the said defendants named filed a joint answer and counterclaim, the counterclaim being a claim,among other things, for certain furniture and furnishings left on the aforementioned premises by the said defendants therein named, said claim being detailed for "value of household furniture $1,500.00 and value of heating plant $1,000.00 in the combined amount of $2,500.00." In the aforesaid cause an answer was duly filed to the counterclaim and issues were framed thereon. This defendant asserts that this cause of action was terminated by a jury denying the relief sought by defendant, Industrial Bank of Washington, plaintiff therein, in the form of a deficiency judgment and holding in favor of the plaintiffs herein named, defendants therein, under the counterclaim in the amount of $250.00, upon which said verdict the Court entered a judgment on to-wit the 8th day of February, 1961 and which said judgment has been settled and satisfied.

This defendant asserts that the matters and things set forth in the complaint in the present cause are matters and things which the plaintiffs asserted or were obligated to assert against this defendant at the time of the assertion of their counterclaim in the aforementioned cause of action. The claim which the plaintiffs herein assert against this defendant is a claim which existed, if at all, at the time when the counterclaim was served upon the defendant, Industrial Bank, in the Municipal Court action hereinbefore referred to, and, further, arose out of the same transaction or occurrence that was the subject matter of the claim set forth in the aforementioned counterclaim and, further, the said claim did not require for its adjudication the presence of any third parties of whom the aforesaid Municipal Court could not have acquired jurisdiction, including this defendant, inasmuch as this defendant at all material times has been a resident of and present in the District of Columbia as was true with respect to all of the other defendants herein named. The claim of the plaintiffs as asserted herein against this defendant, which arose

out of a transaction or occurrence which was the subject matter of the counterclaim in the Municipal Court hereinbefore referred to, was not the subject matter of any pending action at the time of the service of said counterclaim upon the defendant, Industrial Bank of Washington. This defendant asserts that the matters and things set forth and complained of in this complaint were matters and things which should have been raised pursuant to Rule 13(a) of the Municipal Court Rules and were not raised against this defendant by making him a party to said action as required by said Rule and that the plaintiffs herein are now precluded from making any claim or seeking any relief against this defendant by reason of the matters and things set forth in the complaint filed herein.

THIRD DEFENSE

1., 2., & 3. This defendant admits the allegations of paragraphs 1., 2., & 3., except insofar as the right of the plaintiffs to bring the cause of action at all is challenged, in which regard the other defenses hereinbefore set forth are invoked and prayed to be considered as a part of this defense.

4. This defendant admits the allegations of paragraph 4 except so much thereof as asserts the value of the property involved and characterizes the same as a commercial property being used as an investment property with a store and dwelling units combined. As to these said allegations this defendant neither admits or denies the same and demands strict proof.

5. With respect to the allegations in paragraph 5, this defendant is advised that the matters set forth therein are legal conclusions and require no answer.

6. This defendant denies the allegations of paragraph 6.

7. This defendant denies each and every material allegation of fact contained in paragraph 7.

8. This defendant denies each and every material allegation of fact in said paragraph 8.

9. This defendant denies that the plaintiffs have been damaged as

alleged in paragraph 9 of the complaint or in any manner whatsoever.

Wherefore, having fully answered, this defendant prays that the complaint be dismissed with costs.

COBB, HOWARD, HAYES & WINDSOR
613 F Street, N. W.
Washington, D. C.
By:

/s/ George E. C. Hayes

/s/ George H. Windsor

/s/ Julian R. Dugas
Attorneys for Defendant, B. Doyle Mitchell

[Certificate of Service]

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[Filed April 6, 1961]

## ANSWER OF DEFENDANT, INDUSTRIAL BANK OF WASHINGTON

Comes now the defendant the Industrial Bank of Washington, a body corporate doing business in the District of Columbia, and for answer to the complaint or to so much thereof as it is advised that it is material for it to answer, answering says:

### FIRST DEFENSE

The complaint fails to state a cause of action against this defendant upon which relief can be granted.

### SECOND DEFENSE

This defendant asserts that the claim set forth in the said complaint is barred as to this defendant in that in Civil Action No. M 15174-59 in the Municipal Court for the District of Columbia this defendant as plaintiff in that said cause captioned INDUSTRIAL BANK OF WASHINGTON, Plaintiff vs. ROBERT L. EVANS AND LUCILLE W. EVANS, Defendants, C. A. No. M 15174-59, undertook to obtain against the said

defendants in that cause a deficiency judgment growing out of a foreclosure sale of premises 1724 7th Street, N.W. in which said cause the said defendants named filed a joint answer and counterclaim, the counterclaim being a claim, among other things, for certain furniture and furnishings left on the aforementioned premises by the said defendants therein named, said claim being detailed for "value of household furniture $1,500.00 and value of heating plant $1,000.00 in the combined amount of $2,500.00." In the aforesaid cause an answer was duly filed to the counterclaim and issues were framed thereon. This defendant asserts that this cause of action was terminated by a jury denying the relief sought by this defendant, plaintiff therein, in the form of a deficiency judgment, and holding in favor of the plaintiff herein named, defendants therein, under the counterclaim in the amount of $250.00, upon which said verdict the Court entered a judgment on to-wit the 8th day of February, 1961 and which said judgment has been settled and satisfied.

This defendant asserts that the matters and things set forth in the complaint in the present cause are res adjudicata as to this defendant, against whom the plaintiffs asserted or were obligated to assert all the rights, claims, and charges which they had against this defendant at the time of the assertion of their counterclaim in the aforementioned cause of action. Reliance in this regard is had by this defendant on Rule 13(a) of the Municipal Court Civil Rules under the heading "COMPULSORY COUNTERCLAIMS." This defendant asserts that each and all of the things asserted in the complaint herein filed were matters over which the Municipal Court had jurisdiction at the time of the serving of the counterclaim upon this defendant, plaintiff therein, the sole opposing party in that cause and that all the matters and things asserted in the counterclaim filed in the Municipal Court cause arose out of and were a part of the same transactions and occurrences which are set forth as the basis of the claim in the present purported cause of action; that there was no requirement for the adjudication of any claims which might not properly have been made or the presence of any parties over whom the Court could not acquire jurisdiction; and at the time that the action was

commenced said claim was not the subject matter of another pending action.

This defendant asserts that the matters and things set forth in the complaint herein filed are matters which of necessity should have been filed in the counterclaim filed in said Municipal Court cause, and are within the category of the Rule regarding Compulsory Counterclaims, and, having failed to include said claim, the plaintiffs herein are presently barred from asserting same in this proposed new cause of action. As to the plaintiffs and this defendant, all matters asserted in the present complaint are res adjudicata.

THIRD DEFENSE

1., 2., & 3. This defendant admits the allegations of paragraphs 1., 2., & 3., except insofar as the right of the plaintiffs to bring the cause of action at all is challenged, in which regard the other defenses hereinbefore set forth are invoked and prayed to be considered as a part of this defense.

4. This defendant admits the allegations of paragraph 4 except so much thereof as asserts the value of the property involved and characterizes the same as a commercial property being used as an investment property with a store and dwelling units combined. As to these said allegations this defendant neither admits nor denies the same and demands strict proof.

5. With respect to the allegations in paragraph 5, this defendant is advised that the matters set forth therein are legal conclusions and require no answer.

6. This defendant denies the allegations of paragraph 6.

7. This defendant denies each and every material allegation of fact contained in paragraph 7.

8. This defendant denies each and every material allegation of fact in said paragraph 8.

9. This defendant denies that the plaintiffs have been damaged as alleged in paragraph 9 of the complaint or in any manner whatsoever.

Wherefore, this defendant prays that this cause be dismissed as to it with costs.

COBB, HOWARD, HAYES & WINDSOR
* * *

/s/ George E. C. Hayes

/s/ George H. Windsor

/s/ Julian R. Dugas
Attorneys for Defendant, Industrial Bank of Washington

[Certificate of Service]

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[Filed April 7, 1961]

## ANSWER OF DEFENDANT ROBERT M. HARRIS

Comes now the defendant Robert M. Harris and for answer to the complaint filed herein, states:

### FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

### SECOND DEFENSE

The claim asserted by plaintiffs is barred, in that:

1. Defendant Industrial Bank of Washington, a corporation, heretofore, on May 20, 1959, commenced against plaintiffs in the Municipal Court for the District of Columbia, Civil Division, an action entitled The Industrial Bank of Washington vs. Robert L. Evans and Lucille W. Evans, Civil Action No. M 15174-59, which said suit was for a deficiency judgment resulting from the foreclosure sale of the real estate referred to in plaintiff's complaint, which action was terminated by a judgment in favor of the plaintiffs herein, entered February 8, 1961.

2. The claim asserted by plaintiffs in this action now pending arises out of the transaction or occurrence that was the subject matter

of the claim involved in said action in The Municipal Court for the District of Columbia, Civil Action No. M 15174-59; that plaintiffs said claim was in existence at the time plaintiffs served their answer as defendants in said prior action and said claim was not the subject of a pending action at the time said prior action was commenced; that all of defendants named herein were within the jurisdiction of said Municipal Court for the District of Columbia and did not require for the adjudication of said claim the presence of third parties of whom said Court could not have acquired jurisdiction.

3. Plaintiffs herein therefore, were required to assert their alleged claim as a compulsory counterclaim in said prior action in the Municipal Court for the District of Columbia, and having failed to do so said claim is now barred and they may not now assert it by independent action.

THIRD DEFENSE

1. This defendant admits the jurisdiction of the court in this matter.

2. This defendant admits the allegations contained in paragraphs 2 and 3 of the complaint.

3. This defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of said complaint, except that defendant admits that the trustee, Jesse Mitchell, referred to in said complaint, is now deceased, and that the defendant B. Doyle Mitchell is the sole surviving trustee under the deed of trust referred to in said complaint.

4. That the allegations contained in paragraph 5 of said complaint are legal conclusions which this defendant is not required to either admit or deny.

5. This defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of said complaint, except that defendant denies each and every allegation of his participation in said alleged conspiracy.

6. This defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained

in paragraph 7 of said complaint, except that defendant admits that the defendant Waddell R. Thomas conveyed said real estate to this defendant; but this defendant denies that he participated in a conspiracy in connection with the conveyance of said real estate.

7. This defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of said complaint, except defendant admits that the defendant The Industrial Bank of Washington instituted the suit referred to in said complaint against the plaintiffs, and that judgment in said suit was entered against The Industrial Bank of Washington.

8. That the allegation contained in paragraph 9 of said complaint is a legal conclusion which this defendant is not required to either admit or deny.

WHEREFORE, this defendant prays judgment that the plaintiffs take nothing by reason of their complaint filed herein but that the same be dismissed with costs.

/s/ Robert M. Harris

/s/ Philip W. Thomas
Philip W. Thomas & Thomas W. Parks
Attorneys for defendant Robert M. Harris
207 Florida Avenue, N.W.
Washington 1,, D. C.

[Certificate of Service]

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[Filed April 13, 1961]

ANSWER OF DEFENDANT WADDELL R. THOMAS TO COMPLAINT FOR DAMAGES FOR CONSPIRACY IN DEALING WITH TRUST PROPERTY FOR TRUSTEES PERSONAL BENEFIT

Comes now the defendant, Waddell R. Thomas, and for answer to the material allegations of the complaint filed herein, states:

FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

1. This defendant admits the allegations contained in paragraph 1.

2. The allegations contained in paragraph 2 are legal conclusions which this defendant is not required to answer.

3. The defendant admits the material allegations contained in paragraph 3.

4. This defendant denies the alleged value of the land and improvements involved herein as being $40,000; this defendant admits that Jesse Mitchell and B. Doyle Mitchell were named as trustees referred to herein and that Jesse Mitchell is dead; this defendant says he is without knowledge or information upon which to allege the truth of the other allegations of paragraph 4 and as to such allegations he neither admits nor denies, and demands strict proof.

5. The allegations of paragraph 5 are immaterial as to this defendant or are legal conclusions which require no answer of this defendant.

6. This defendant denies each and every material allegation contained in paragraph 6.

7. This defendant admits that defendant, B. Doyle Mitchell, did cause to be conveyed to him the property referred to in the complaint, that defendant, B. Doyle Mitchell, did waive the necessity for deposit; that he conveyed said property to Robert M. Harris when he decided not to purchase the property himself; that this defendant denies each and every other material allegation of fact in said complaint, and those which are legal conclusions he is not required to answer; he denies any knowledge or participation in the alleged conspiracy.

8. This defendant admits that suit, referred to in the complaint, was filed in the Municipal Court for the District of Columbia as alleged in paragraph 8; that said suit was terminated by a judgment in favor of

of the plaintiffs herein; he has no information upon which to form a belief with respect to the other allegations in said paragraph.

This defendant avers that the claim of the plaintiffs in this action is based on the transactions and occurrences which constituted the subject matter of the aforesaid Municipal Court action; that said action did not require for its adjudication the presence of any third party over whom said Court could not have acquired jurisdiction; that the plaintiffs herein were required to assert their claim as a compulsory counterclaim in the prior action in the Municipal Court; that they failed to do so and therefore their claim is barred and they may not now assert it or seek relief in this cause.

9. That all of the allegations of paragraph 9 are legal conclusions which require no answer by this defendant.

10. That all of the material allegations in this complaint which are not expressly admitted are expressly denied.

WHEREFORE, Waddell R. Thomas, having fully answered, prays that the complaint be dismissed, with costs.

/s/ Waddell R. Thomas

DISTRICT OF COLUMBIA, SS:

Waddell R. Thomas, being first duly sworn on oath according to law deposes and says that he has read the foregoing Answer by him subscribed and knows the contents thereof; that the matters of fact therein stated are true to his best knowledge, information and belief.

/s/ Waddell R. Thomas

Subscribed and sworn to before me this 13th day of April, 1961.

/s/ Anderson Springs
Notary Public, D. C. [SEAL]

/s/ Belford V. Lawson, Jr.
Attorney for Defendant,
Waddell R. Thomas
2001 - 11th Street, N.W.
Washington 1, D. C.

[Certificate of Service]

[Filed June 5, 1961]

## MOTION TO STRIKE

Come now the plaintiffs by their attorneys and move the Court to strike Defense #2 of the answers of the defendants #1, #2, and #4, and so much of paragraph #8 in the Second Defense of the Answer of defendant #3, as relates to the alleged failure to file a compulsory counterclaim and for reasons therefor, state:-

1. That the defendants have misconceived the reach and effect of Rule 13a of the Municipal Court.

2. That even the most casual reading of the complaint will be demonstrating the fallacy of the position which the defendants must needs take in order to buttress the defense attempted by the defense sought to be interposed.

3. That it is palpably obvious that the Municipal Court was without jurisdiction to entertain the action upon which this cause rests.

4. And for other reasons to be urged at the hearing of the motion.

/s/ Thurman L. Dodson
Attorney for plaintiffs

[Certificate of Service]

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[Filed June 30, 1961]

## MOTION OF THE DEFENDANTS, B. DOYLE MITCHELL AND THE INDUSTRIAL BANK OF WASHINGTON TO DISMISS THE COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

The defendants, B. Doyle Mitchell and the Industrial Bank of Washington, by their counsel of record, move this Court to dismiss the complaint or in the alternative for summary judgment.

In support of said Motion it is asserted:

The complaint does not allege either directly or indirectly that any losses, injuries or damages were incurred by the plaintiffs as a result of any acts or omissions on the part of these defendants. There are no issues of fact which by resolution would entitle the plaintiffs to recovery. The complaint relies on unsupported conclusions of law which create no justiciable issue.

The complaint does not state facts which, if established, would entitle the plaintiffs to recover either compensatory or punitive or exemplary damages from these defendants. There is an entire lack of allegations setting forth the true conditions under which the foreclosure sale, made the basis of this cause, was had with proper reference to the unexplained and unexplainable default on the part of the plaintiffs.

The complaint alleged in substance that the defendant, Industrial Bank of Washington, was the holder of a promissory note made by the plaintiffs and secured by a deed of trust to Jesse H. Mitchell and B. Doyle Mitchell; that the note, which contained an acceleration clause, became in default; that the defendant B. Doyle Mitchell as surviving trustee instituted foreclosure proceedings; that at a foreclosure sale the security property was sold to and purchased by one of the other named defendants who in fact allegedly was acting as agent for B. Doyle Mitchell individually. It is the established law in this jurisdiction as demonstrated in the annexed Memorandum of Points and Authorities in support of this motion that the facts as alleged do not give rise to a right of action cognizable in a court of law in which the claim is made nor indeed to an equitable action by reason of a failure to assert essential allegations which are conditions precedent to such an action and because of the doctrine of the appeal to equity being allowed only with clean hands.

Respectfully submitted,
COBB, HOWARD, HAYES & WINDSOR
By:

/s/ George E. C. Hayes

/s/ George H. Windsor
Attorneys for Defendants B. Doyle Mitchell and the Industrial Bank of Washington

[Certificate of Service]

[Filed June 30, 1961]

## STATEMENT OF MATERIAL FACTS

It appears from the facts alleged in the plaintiffs' complaint and the answers filed by the respective parties hereto B. Doyle Mitchell and the Industrial Bank of Washington, and from the affidavit in support of motion to dismiss and/or for summary judgment by B. Doyle Mitchell, that the plaintiffs obtained a loan in the amount of $14,000 from the Industrial Bank of Washington in to-wit April of 1954 and executed their promissory note to the bank as payee and also executed a deed of trust on real estate owned by the plaintiff to B. Doyle Mitchell and Jesse H. Mitchell as trustees to secure the payment of said note. The note contained the usual acceleration clause in the event of default and also contained the usual provision for sale by the trustees as a means of foreclosure. The plaintiffs, makers of the promissory note, became in default and remained in default over a substantial period of time. Thereupon the plaintiffs entered into negotiations with the Industrial Bank of Washington looking toward a new loan to refinance the note and deed of trust, which said negotiations were not consummated by a new loan. Thereafter and at a time when the plaintiffs were approximately 11 months in arrears in the payment of monthly installments on said note, the defendant, B. Doyle Mitchell (the other trustee Jesse H. Mitchell being deceased) at the instance of the Industrial Bank instituted foreclosure proceedings. The sale was conducted after public advertisement and actual notice to the debtors of the time and place of the sale. The debtors did not appear at the foreclosure sale nor participate therein.

The foreclosure sale in the form of a public auction by an independent auctioneer was made to one Waddell R. Thomas, to whom the property was conveyed by deed, duly recorded among the land records of the District of Columbia, who in turn prior to the time of settlement at the Title Company conveyed the property to one Robert Harris and the said title to the property became vested in the said Robert Harris by deed duly recorded among the land records of the District of Columbia.

There has been no subsequent sale and said title remains vested in the said Robert Harris, one of the defendants in this cause. The plaintiffs at all times knew the identity of the holder of the note and never at any time did they offer to pay the balance of principal and interest up-to-date in accordance with the terms of the promissory note, nor the full amount due under the acceleration clause.

The Industrial Bank of Washington brought suit against the plaintiffs herein, Robert L. Evans and Lucille W. Evans, asserting that after the application of $12,300.00, the amount at which the property was bid in at the foreclosure sale, there remained a deficiency of $1,518.19, which was the basis of a cause of action by the Industrial Bank of Washington seeking a deficiency judgment against the plaintiffs herein, Robert L. Evans and Lucille W. Evans. In this cause the plaintiffs filed a counterclaim in the amount of $2,500 based on the alleged value of household furniture and the value of a heating plant in the property on which foreclosure had been had and said cause resulted in a verdict and judgment in favor of the defendants Robert L. Evans and Lucille W. Evans in the main cause of action and a verdict and judgment in favor of the said Robert L. Evans and Lucille W. Evans in the amount of $250.00 on the counterclaim, which said judgment has been paid, settled and satisfied, all of which are material facts about which there is no genuine issue.

Paragraphs 1 thru 9 of the complaint contain no material facts about which there is a genuine issue. They indulge only in conclusions of law, statements of the pleader and allegations which contain no basis for the relief sought.

Based upon the foregoing the defendants, B. Doyle Mitchell and Industrial Bank of Washington, contend there are material facts in the complaint which contain a genuine issue.

COBB, HOWARD, HAYES & WINDSOR
* * *
/s/ George E. C. Hayes

/s/ George H. Windsor
Attorneys for B. Doyle Mitchell and
the Industrial Bank of Washington

[Filed June 30, 1961]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA, ss:

I, B. Doyle Mitchell, being first duly sworn according to law, on oath, depose and say: That I am the President of the Industrial Bank of Washington and one of the defendants named in the above-entitled cause in which I am also sued in my individual capacity. I do hereby assert as follows:

That on or about April 1, 1954 the plaintiffs in this cause borrowed the sum of $14,000 from the defendant corporation, Industrial Bank of Washington, and executed a promissory note whereunder they jointly and severally became obligated to pay to the order of the said Industrial Bank of Washington the sum of $14,000. with interest until paid at the rate of 5% per annum, said principal and interest being payable in monthly installments of $110.00 beginning May 1, 1954 and continuing until April 1, 1964 when the balance then remaining unpaid would become due and payable. The said note contained an acceleration clause which provided:

> "And it is expressly agreed that if default be made in the payment of any of the aforesaid installments when and if the same shall become due and payable then and in that event the unpaid balance of the aforesaid principal sum and accrued interest shall at the option of the holder hereof at once become due and payable."

The aforesaid promissory note was secured by a deed of trust executed by the plaintiffs herein April 1, 1954 and recorded on April 1, 1954 in Liber 10166 at Folio 295 in the Office of the Recorder of Deeds for the District of Columbia herein. The plaintiffs conveyed real estate described as part of original Lot 10 in Square 419 in the District of Columbia improved by premises 1724 Seventh Street, N.W. to Jesse H. Mitchell and B. Doyle Mitchell, Trustees. Affiant sets forth that the said Jesse H. Mitchell thereafter departed this life leaving as the sole surviving trustee, this affiant, B. Doyle Mitchell, who was the said sole surviving trustee at the time of all of the occurrences complained of in the Bill of Complaint filed in this cause.

This affiant sets forth that the plaintiffs in this cause thereafter defaulted under the terms of the said note and arrangements were made by the plaintiffs with the defendant bank corporation as of to-wit August 20, 1958 that a loan of $13,500 would be made so as to refinance the property and take care of, among other things, the defaulted payments then owed by the plaintiffs herein. Affiant sets forth that defendant bank corporation sent the money to the Title Company to consummate this refinanced proposition but same was never consummated because unsatisfied tax liens owed by the plaintiffs and required to be paid left an amount insufficient to properly accomplish the refinancing. Affiant sets forth that thereafter the proposed settlement at the Title Company was cancelled and the plaintiffs herein were notified that they would have to pay the 11 monthly installment payments then past due, together with outstanding obligations due by the plaintiffs in the form of taxes and auctioneers' fees, or that else foreclosure would be had of the said real estate.

This affiant sets forth that the property was sold at public auction on the first day of December 1958. Affiant sets forth that the male plaintiff was an experienced real estate broker and was fully advised of his rights and obligations. Affiant states in this regard that the plaintiffs had full knowledge of their own delinquencies and of the time and place of the said auction sale, and states that at no time did the plaintiffs tender the amount for which they were obligated under the terms of the note hereinbefore described, nor did they appear at or participate in public auction sale, nor have they to this date made any tender of the amount of delinquent monthly installments which they were obligated to pay under the terms of the note, nor has there been any tender of payment of the note under the acceleration clause hereinbefore recited.

Affiant states that the defendant bank in this cause brought suit in the Municipal Court of the District of Columbia, Civil Action No. M15174 in 1959 in which it sought to recover a claim deficiency against the plaintiffs herein in the amount of to-wit $1,518.90 plus interest and costs, which said cause was answered by the plaintiffs herein denying the owing of said amount and claiming by way of counterclaim the

amount of $2,500.00 against the said plaintiff bank, defendant in this cause, which said counterclaim was based on the value of household furniture and the value of the heating plant in the property which had been foreclosed by the aforementioned plaintiff bank, defendant in this cause. In the said Municipal Court action the relief sought by the plaintiff bank was denied and verdict was had and judgment rendered in favor of the defendants, plaintiffs in this cause, in the amount of $250.00, which said amount has been duly paid and accepted by the plaintiffs herein.

This affiant sets forth that at the time of foreclosure the property was bid in by Waddell R. Thomas, named as defendant in this cause, and that a deed was executed to Waddell R. Thomas who in turn, prior to the time of settlement at the Title Company, conveyed the property to Robert Harris and that the title to the said property thus vested in Robert Harris remains presently in said Robert Harris, one of the defendants in this cause.

This affiant relies upon his answer filed in this cause as being his answer individually and in a representative capacity for the defendant bank and prays that the facts therein set forth and allegations made be considered as a part hereof.

/s/ B. Doyle Mitchell

[JURAT the 30th day of June, 1961.]
[Notarial Seal]

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[Filed July 1, 1961]

## MOTION OF DEFENDANT ROBERT M. HARRIS FOR SUMMARY JUDGMENT

Comes now the defendant Robert M. Harris and respectfully moves the Court to grant summary judgment herein against the plaintiffs, and as grounds therefor assigns the following:

1. The complaint fails to state a claim upon which relief can be granted.

2. Plaintiffs' within claim is barred as an independent action.

3. And for other reasons to be presented for consideration of the Court upon the hearing of this motion.

/s/ Philip W. Thomas
Philip W. Thomas & Thomas W. Parks
Attorneys for Defendant Robert M. Harris

* * *

[Certificate of Service]

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[Filed July 1, 1961]

## AFFIDAVIT OF DEFENDANT ROBERT M. HARRIS

DISTRICT OF COLUMBIA, SS:

Robert M. Harris, being first duly sworn according to law, deposes and says: that he is a defendant in the above captioned cause; that he was a witness and testified in the case of Industrial Bank of Washington, plaintiff, against Robert L. Evans and his wife, Lucille W. Evans, defendants, Civil Action No. M 1517-59 in the Municipal Court for the District of Columbia; that he was a resident of the District of Columbia, and was in the jurisdiction of said Municipal Court at all times immediately prior to the filing of said Civil Action in May 1959 up to and including the present time, and during said time he was available for service of process in connection with any matter growing out of said Civil Action.

/s/ Robert M. Harris

[JURAT the 29th day of June, 1961.]
[Notarial Seal]

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[Filed July 10, 1961]

MOTION OF DEFENDANT WADDELL R. THOMAS
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Comes now the defendant Waddell R. Thomas, by and through his attorney of record, and moves the Court to Dismiss the complaint filed herein or in the alternative for summary judgment and as his reasons therefor states as follows:

1. The complaint fails to state a claim upon which relief can be granted.

2. The issues raised by the complaint have been litigated and decided and plaintiffs' claim is barred as an independent action.

3. For such other and further reasons as may be advanced upon the hearing of this motion.

/s/ B. V. Lawson, Jr.
Attorney for Defendant addell R. Thomas

* * *

[Certificate of Service]

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[Filed July 21, 1961]

ORDER GRANTING MOTION TO STRIKE

Upon consideration of the motion of the plaintiffs to strike Defense #2 of the answers of defendants #1, #2 and #4 and so much of paragraph 8 in the second defense of the defendant #4, the opposition thereto and after argument of counsel, it is this 21st day of July, 1961,

ORDERED, that the Defense #2 of the answers of the defendants #1, #2 dn #4 be, and the same hereby are,stricken from the respective answers of the aforementioned defendants. And it is further

ORDERED, that so much of paragraph #8 of the second defense of defendant #3 as relates to the alleged failure to file a compulsory counterclaim be, and the same also is, stricken from the answer of the aforesaid defendant #3.

BY THE COURT:

/s/ Edward A. Tamm
JUDGE

[Certificate of Service]

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[Filed July 29, 1961]

MOTION OF DEFENDANT HARRIS FOR LEAVE TO FILE AN AMENDED ANSWER

Comes now the defendant Robert M. Harris and moves the Court for leave to file an amended answer, a copy of which is hereto attached as Exhibit A, on the ground that justice requires that this defendant be given the opportunity to plead the defense set forth in said amended answer in order that all issues between the parties may be fully litigated in this action.

/s/ Philip W. Thomas
Philip W. Thomas & Thomas W. Parks
Attorneys for Defendant Harris

* * *

POINTS AND AUTHORITIES

Leave to file an amended pleading should be freely given. Rule 15(a) F. R. C. P.

## NOTICE OF MOTION

Thurman L. Dodson, Esq.
626 Third Street, N. W.
Washington, D. C.

Please take notice that the foregoing Motion will come on for hearing before the Judge in Motions Court of this Court and you will be notified by the clerk of said Motions Court as to the date and time of the hearing of said Motion.

/s/ Philip W. Thomas
Attorney for Defendant Harris

* * *

[Certificate of Service]

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## AMENDED ANSWER OF DEFENDANT HARRIS

### Second Defense as Amended

1. On May 20, 1959 the within defendant Industrial Bank of Washington commenced an action in the Municipal Court for the District of Columbia against the plaintiffs herein - Civil Action No. M 15174-59, to recover the amount of a money deficiency resulting from a foreclosure sale had on December 1, 1958 of certain real estate under a deed of trust securing a promissory note for money loaned by said Bank to said plaintiffs.

2. Plaintiffs, as defendants in said Municipal Court action, defended said suit on the ground that said foreclosure sale was a nullity because of certain alleged acts of duplicity and collusion of the within defendants in connection with said foreclosure sale. Judgment in this case was entered February 8, 1961 in favor of the plaintiffs herein.

3. Plaintiffs' within claim arises out of the transaction or occurrence that was the subject matter of said prior Municipal Court action and as such was a compulsory counterclaim, the amount of which exceeded the jurisdiction of the Municipal Court; that said claim should have been

filed in the United States District Court for the District of Columbia before judgment was entered in said Municipal Court action; that plaintiffs' said claim was filed in this Court on March 10, 1961 which was after the judgment in said Municipal Court action was entered, therefore, said claim may not now be asserted herein as an independent action.

/s/ Philip W. Thomas & Thomas W. Parks
Attorneys for Defendant Harris

* * *

(Defendant Harris' Exhibit A)

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[Filed August 3, 1961]

MOTION OF DEFENDANT WADDELL R. THOMAS FOR LEAVE TO FILE AN AMENDED ANSWER

Comes now the defendant Waddell R. Thomas and moves the Court for leave to file an amended answer, a copy of which is hereto attached as Exhibit A, on the ground that justice requires that this defendant be given the opportunity to plead the defense set forth in said amended answer in order that all issues between the parties may be fully litigated in this action.

/s/ B. V. Lawson, Jr.
Attorney for Defendant Waddell R. Thomas

* * *

POINTS AND AUTHORITIES

Leave to file an amended pleading should be freely given. Rule 15(a) F.R.C.P.

NOTICE OF MOTION

Thurman L. Dodson, Esquire
626 Third Street, N.W.
Washington, D. C.

Please take notice that the foregoing Motion will come on for hearing before the Judge in Motions Court of this Court and you will be notified by the Clerk of said Motions Court as to the date and time of the hearing of said Motion.

/s/ B. V. Lawson, Jr.

[Certificate of Service]

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AMENDED ANSWER OF DEFENDANT
WADDELL R. THOMAS

Paragraph Eight as Amended

8. This defendant admits that the suit referred to in the complaint was filed in the Municipal Court for the District of Columbia as alleged in paragraph 8; that said suit was terminated by a judgment in favor of the plaintiffs herein; he has no information upon which to form a belief with respect to the other allegations in said paragraph.

This defendant avers that the claim of the plaintiffs in this action is based on the transactions and occurrences which constituted the subject matter of the aforesaid Municipal Court action and as such was a compulsory counterclaim, the amount of which exceeded the jurisdiction of the Municipal Court; that said claim should have been filed in the United States District Court for the District of Columbia before judgment was entered in said Municipal Court action; that plaintiffs' said claim was filed

in this Court on March 10, 1961, which was after the judgment in said Municipal Court action was entered, therefore, said claim may not be now asserted herein as an independent action.

/s/ B. V. Lawson, Jr.
Attorney for Defendant Waddell R. Thomas

* * *

(Defendant Thomas' Exhibit "A")

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[Filed August 3, 1961]

## MOTION OF DEFENDANTS B. DOYLE MITCHELL AND INDUSTRIAL BANK OF WASHINGTON FOR LEAVE TO FILE AN AMENDED ANSWER

Come now the defendants B. Doyle Mitchell and the Industrial Bank of Washington and move the Court for leave to file an amended answer, a copy of which is hereto attached as Exhibit A, on the ground that justice requires that these defendants be given the opportunity to plead the defense set forth in said amended answer in order that all issues between the parties may be fully litigated in this action.

COBB, HOWARD, HAYES & WINDSOR
* * *

/s/ George E. C. Hayes

/s/ George H. Windsor
Attorneys for Defendants B. Doyle Mitchell and Industrial Bank of Washington

## POINTS AND AUTHORITIES

Leave to file an amended pleading should be freely given. Rule 15(a) F.R.C.P.

## NOTICE OF MOTION

Thurman L. Dodson, Esq.
626 Third Street, N.W.
Washington, D. C.

Please take notice that the foregoing Motion will come on for hearing before the Judge in Motions Court of this Court and you will be notified by the clerk of said Motions Court as to the date and time of the hearing of said Motion.

COBB, HOWARD, HAYES & WINDSOR
* * *

/s/ George E. C. Hayes

/s/ George H. Windsor
Attorneys for Defendants B. Doyle
Mitchell and Industrial Bank of Washington

[Certificate of Service]

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## AMENDED ANSWER OF DEFENDANTS B. DOYLE MITCHELL AND INDUSTRIAL BANK OF WASHINGTON

### Second Defense as Amended

1. On May 20, 1959 the within defendant Industrial Bank of Washington commenced an action in the Municipal Court for the District of Columbia against the plaintiffs herein – Civil Action No. M 15174-59, to recover the amount of a money deficiency resulting from a foreclosure sale had on December 1, 1958 of certain real estate under a deed of trust securing a promissory note for money loaned by said Bank to said plaintiffs.

2. Plaintiffs, as defendants in said Municipal Court action, defended said suit on the ground that said foreclosure sale was a nullity because of certain alleged acts of duplicity and collusion of the within defendants in connection with said foreclosure sale. Judgment in this

case was entered February 8, 1961 in favor of the plaintiffs herein.

3. Plaintiffs' within claim arises out of the transaction or occurrences that was the subject matter of said prior Municipal Court action and as such was a compulsory counterclaim, the amount of which exceeded the jurisdiction of the Municipal Court; that said claim should have been filed in the United States District Court for the District of Columbia before judgment was entered in said Municipal Court action; that plaintiffs' said claim was filed in this Court on March 10, 1961 which was after the judgment in said Municipal Court action was entered, therefore, said claim may not now be asserted herein as an independent action.

COBB, HOWARD, HAYES & WINDSOR
* * *

/s/ George E. C. Hayes

/s/ George H. Windsor
Attorneys for Defendants B. Doyle Mitchell and Industrial Bank of Washington

(Defendants' B. Doyle Mitchell and Industrial Bank of Washington Exhibit A)

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[Filed Aug. 16, 1961]

ORDER

This matter came on for hearing and argument before the Court on the motions of Defendants (1) for leave to file amended answers, (2) for leave to file supplemental points and authorities in support of motions for summary judgment, and (3) to dismiss or in the alternative, for summary judgment. After reviewing the record, the points and authorities in support of and in opposition to the motions, and the supplemental points and authorities filed pursuant to this Order, prior court orders, and other papers on file in the case, it is this 16th day of August, 1961,

ORDERED, that the Defendants' motions for leave to file supplemental points and authorities in support of the motions for summary judgment be, and the same hereby are, granted; and

FURTHER ORDERED, that the Defendants' motions for leave to file amended answers be, and the same hereby are, denied; and

Further Ordered, that Defendants' motions to dismiss, or in the alternative, for summary judgment be, and the same hereby are, denied.

/s/ Leonard P. Walsh,
Judge

Thurman L. Dodson, Esq.,
* * *
Attorney for Plaintiffs

Cobb, Howard, Hayes, and Mitchell
* * *

Belford V. Lawson, Esq.
* * *

Philip W. Thomas and Thomas W. Parks, Esqs.
* * *
Attorneys for Defendants

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[Filed Feb. 8, 1963]

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Complaint for damages for conspiracy in dealing with trust property for trustee's personal benefit.

UNDISPUTED FACTS:

On April 1, 1954, P Robert and Lucille Evans were the record owners of Block 832 in Square 419, improved by premises 1724 7th Street, N. W., in the District of Columbia.

On April 1, 1954, Ps obtained a loan from D The Industrial Bank of Washington, a corporation, in the amount of $14,000, for which they executed a promissory note in said amount, with interest at 5% per annum,

secured by a first deed of trust on the realty, which named D B.Doyle Mitchell and one Jesse Mitchell, now deceased, trustees.

D B.Doyle Mitchell was and is President of D Industrial Bank, a member of its Board of Directors, and the agent, servant or employee of the Bank.

Ps defaulted in their payments on account of said note, and were notified that a foreclosure sale would be held. The foreclosure sale was duly advertised, and was held December 1, 1958.

The property was bid in at foreclosure by D Waddell R. Thomas, a licensed real estate broker in the District of Columbia, for the sum of $12,300. No deposit was made at the time of the foreclosure sale.

Prior to the time fixed for settlement at the Title Co., D Mitchell executed a deed conveying the property to Thomas.

When settlement was made at the Title Co. D Robert M. Harris took title to the property. D Harris executed a new note and deed of trust to secure Industrial Bank, which put up at least part of the purchase money.

The real property is still titled in the name of D Harris.

Following the foreclosure, D herein Industrial Bank, as P, filed an action against Ps herein Evans, as Ds, for a deficiency on the note in the amount of $1,518.19, and Ps herein filed a counterclaim claiming damages in the amount of $2500 for conversion of personal property. Said case terminated in a verdict for the Ds Evans on the principal action and also in favor of Ds Evans as counterclaimants in the amount of $250.

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PLAINTIFFS assert that the value of the realty here involved, which was commercial property, was $40,000; that all of the Ds conspired to traffic in Ps' said realty for the benefit of D Mitchell, who acted in violation of his fiduciary duty to the Ps as trustee under the deed of trust.*

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* NOTE: Counsel for P at pretrial sought to assert that the foreclosure was in violation of an agreement between Mitchell, acting for D Bank, and the male P that foreclosure proceedings would be held in abeyance until P could get certain tax liens released. Counsel for Ds object to this as beyond the complaint. THE EXAMINER HOLDS SUCH ALLEGATIONS OUTSIDE THE COMPLAINT.

Plaintiffs assert that the purported foreclosure sale to D Waddell R. Thomas was not a bona fide sale; that it was in violation of the published terms of sale; that it was made without a deposit; that D Thomas never put up any money.

Plaintiffs assert that all of the Ds conspired with Mitchell, who caused the property to be deeded to D Thomas, and D Harris substituted as owner in place of Thomas; that Harris is a "straw" for Mitchell; that Harris has never paid any money of his own on account of purchase of the property, and is and was financially embarrassed; that Mitchell collects the rents, contracts for utilities, and ostensibly advances sums of money to D Harris, but the property is in fact that of D Mitchell.

Plaintiffs further assert that to further harass Ps, D Industrial Bank filed in the Municipal Court Civil Action M 15174-59 seeking a deficiency judgment.

Plaintiffs claim damages as follows:

| | | | |
|---|---|---|---|
| Compensatory: | difference between value of property | $40,000 | |
| | and balance on note | 12,000 | |
| | | | $28,000 |
| | Interest on investment of about $20,000 - 12% for in excess of 4 years - anticipated profit - | | 10,000 |
| | Attorney's fee in Municipal Court action | | 1,000 |
| | Investigations and transcript of Municipal Court proceeding | | 500 |
| | | | $39,500 |

(Plus anticipated profits on investment to date of trial.)
Plaintiffs also claim punitive damages.

(TOTAL ad dammum clause is $250,000)

DEFENDANT Mitchell denies all allegations of conspiracy and violation of his duties as trustee, and denies that he acted improperly in any respect.

Defendant asserts that upon default of Ps in payment of their note, secured by a first deed of trust on the realty, arrangements were made by the Ps with Industrial Bank as of August 20, 1958, to make a loan of $13,500 so as to refinance the property and to take care of, among other things, the payments on the note which were then in default; that Industrial Bank, in furtherance of this arrangement, sent $13,500 to the Title Co. to consummate the refinancing proposition, but the same was not consummated because unsatisfied tax liens owed by the Ps and required to be paid, left an amount insufficient properly to accomplish the refinancing.

Defendant Mitchell further asserts that a foreclosure was requested thereafter by the Industrial Bank, Ps being 11 months in arrears in their payments, and foreclosure was undertaken by D Mitchell as surviving trustee; that the male P was an experienced real estate broker and was fully advised of his rights and obligations; that Ps had full knowledge of their delinquency and of the time and place of the foreclosure auction sale, but at no time did Ps tender the amounts due under the terms of the note, nor did they or either of them appear at or participate in the foreclosure sale, nor have they to this date made any tender of the amount of delinquent monthly installments which they were obligated to pay under the terms of the note or any tender of payment of the balance due on the note under the acceleration clause.

Defendant Mitchell asserts that at the time of foreclosure the property was bid in by D Thomas; that a deed was executed to Thomas, who, in turn, prior to the time of settlement at the Title Co., conveyed the property to D Harris, and that title to the property remains in D Harris.

Defendant Mitchell further asserts that D Harris is presently in default under the terms of a deed of trust note executed by him, but that steps have not been taken to recover the amount due D Bank, because of the pendency of this litigation.

Defendant Mitchell asserts that the foreclosure was not wrongful but was regular in all respects and was in all regards rightful, because of Ps' breach of the conditions of their obligation under the deed of trust.

Defendant Mitchell denies that he colluded with, conspired with, or in any way contrived with any of the other Ds to obtain control of or ownership of the real property in question, or that he took any steps to get control and ownership of the property for his personal use and profit.

Defendant Mitchell denies any alleged preconceived scheme between himself and D Thomas, or that the sale was in violation of the published terms of sale, and asserts that the authority given to the auctioneer to close the matter without a deposit from the D Thomas was within the authority of D Mitchell as surviving trustee and was justified because of the relationship of said Waddell R. Thomas with the D Bank, at whose instance the sale was had; that D Thomas was a depositor in and appraiser for D Industrial Bank.

Defendant Mitchell asserts that the sale was a bona fide sale, and denies that any actions were taken by him in violation of his obligation as a trustee or in violation of law.

This D asserts that the deeding of the property to D Thomas was in accordance with the purchase of said property at the foreclosure proceeding and was in accordance with an arrangement subsequent to the foreclosure that title was to be vested in D Harris, who was to assume the obligations with which D Thomas was chargeable under the conditions of the foreclosure sale.

Defendant Mitchell denies that the transfer of the property to D Harris was in any wise a scheme or device on his part, denies any interest on his part in the real property, denies that D Harris was his agent, tool or straw, and denies that any advances made by him to Harris in an attempt to conserve Harris' interests in said property were any guise or pretext on D Mitchell's part; and Defendant Mitchell asserts that any advances to Harris were in an attempt to render workable Harris' plan to assume and carry out his obligations of purchase and to protect the interest of Harris and the investment of D Bank.

Defendant Mitchell denies any personal or financial interest in the property and asserts that the collection of rents by him was only for a period of time necessary for adjustment of the property in the name of

the new purchaser and the same was true with respect to his relation to the payment of utilities on said premises. D Mitchell denies advancement to Harris of any sums of money other than personal loans to Harris to render possible taking over of operation of the property by Harris and payment of the obligations due D Bank.

Defendant Mitchell denies that bringing of the Municipal Court action by Industrial Bank of Washington against Ps was any scheme on his part to harass the Ps, and asserts that the suit was in furtherance of D Mitchell's obligation to D Bank to attempt recovery of the amount due said Bank from Ps.

Defendant Mitchell denies that any steps taken by him have in any wise resulted in any damage to Ps, and asserts on the contrary that every opportunity, both before and after the foreclosure proceedings, has been given to the Ps to protect any such equity or interest as they had in the property.

DEFENDANT INDUSTRIAL BANK asserts that it has been no part of and no party to any action of collusion, conspiracy or participation in any transactions between Ds Mitchell, Thomas and/or Harris, and specifically denies any acquiescence on its part in any such alleged conspiracy or collusive action of any kind or character.

Defendant Bank adopts all the factual allegations and defenses of D Mitchell, as recited above.

DEFENDANT Thomas denies all allegations of conspiracy on his part, and denies that he conspired with any one at any time to cause D Harris to be substituted as owner of Ps' property.

D Thomas denies the alleged value of the land and improvements was or is $40,000.

Defendant Thomas admits that D Mitchell conveyed the realty to him, that D Mitchell waived the necessity for deposit, and that he, Thomas, conveyed the property to D Harris after he decided not to purchase the property. D Thomas denies any knowledge of or participation

of any kind with any one in the conspiracy alleged, and denies that Ps have any cause of action against him.

DEFENDANT Harris denies all allegations of collusion, conspiracy and fraud on his part in connection with the foreclosure of the real estate here involved, denies that the real estate is of the value of $40,000, and denies that Ps sustained, as the result of said foreclosure sale, damages of the nature or extent alleged; and he further denies that Ps are entitled to punitive damages in this case.

Defendant Harris adopts such defenses recited herein by Ds Mitchell and Industrial Bank of Washington, as may be pertinent on this D's behalf.

NOTE: Each of the Ds sought to include the defense that the Municipal Court action between Industrial Bank and Ps herein is res judicata of this action and that the matters raised herein by Ps were part of a compulsory counterclaim in said Municipal Court action. Ds also sought to allege the defense stated in their proposed Amended Answers. IN VIEW OF THE ORDERS OF JULY 21, 1961 AND AUGUST 16, 1961, THE EXAMINER HAS NOT INCLUDED THESE DEFENSES.

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

Any certified copies of instruments on record with the Recorder of Deeds.

The Municipal Court file in C.A. No. M 15174-59, Industrial Bank v. Evans.

All records of the Title Company.

Any other documents initialled by all counsel prior to trial.

Counsel agree to exchange within two weeks the names and addresses of all witnesses known to them, including expert witnesses but exclusive of impeachment witnesses (filing a copy of said list with the Clerk of the Court), and if they learn of any additional witnesses prior to trial, they will exchange the names and addresses promptly.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

Trial Attorneys: For Ps - Thurman L. Dodson

For D Mitchell and Industrial Bank - - George E. C. Hayes

For D Thomas - Belford V. Lawson

For D Harris - Philip W. Thomas.

/s/ Elizabeth Bunten
Assistant Pretrial Examiner

Attorneys:

| | |
|---|---|
| /s/ Thurman L. Dodson | For Plaintiffs |
| /s/ Julian R. Dugas | For Ds Mitchell and Industrial Bank |
| /s/ B. V. Lawson, Jr. | For D Thomas |
| /s/ P. W. Thomas | For D Harris |

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[Filed Feb. 12, 1963]

OBJECTIONS TO PRE-TRIAL ORDER

Come now the plaintiffs, by their attorney and object to the ruling of the Pre-Trial Examiner in restricting the plaintiffs claim contrary to the clear allegation in the complaint and in and in refusing to the plaintiffs the right to rely upon a moratorium which the plaintiffs aver was granted them by the defendants bank by its agent and president the defendant, B. Doyle Mitchell and in support hereof relies upon paragraph #7 of the complaint and for reasons therefor state:

1. That the "agreement" which plaintiffs charge was violated in paragraph #7 of the complaint affords a basis sufficiently broad to support the moratorium which plaintiffs aver was violated.

2. Further in paragraph 8, of the complaint, the proceedings testimony and records in Municipal Court Civil Action #M15174-59, were incorporated in this cause by reference. At the trial in the Municipal Court there was evidence adduced of this agreement or moratorium.

3. And for other reasons to be heard upon the hearing of this objection.

/s/ Thurman L. Dodson
Attorney for Plaintiffs

[Certificate of Service]

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[Filed March 11, 1963]

ORDER

This matter having come before the Court on plaintiffs Objections To Pre-Trial Order, and upon consideration thereof and oral arguments for the respective parties in open Court, and it appearing to the Court that the plaintiffs Objection To Pre-Trial Order should be overruled, it is this 11th day of March, 1963,

ORDERED:

That the Objections To Pre-Trial Order of the plaintiffs be, and the same are overruled. It is further ordered that plaintiffs may move to amend their complaint if they so desire by proper motion within ten (10) days.

/s/ Leonard P. Walsh
J U D G E

[Certificate of Service]

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[Filed July 15, 1963]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Tuesday, May 7, 1963

The above-entitled matter came on for hearing before THE HONORABLE CHARLES F. McLAUGHLIN, District Judge, and a jury, commencing at 10:10 A.M.

* * * * *

11 ROBERT L. EVANS

having been called as a witness as plaintiff, was sworn, took the stand, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. DODSON:

* * * * *

18 Q. Did the Title Company search develop anything with respect to you? A. Yes.

Q. What did it develop? A. It developed that the Federal Government had tax lien of $600.00 against me. Not my wife, against me.

* * * * *

53 CROSS EXAMINATION

BY MR. HAYES:

* * * * *

57 (Thereupon, letter dated February 28, 1958, was marked Defendant Mitchell's Exhibit No. 1, for identification, and received in evidence.)

MR. HAYES: (Reading). Dated February 28, 1958.

"Mr. and Mrs. Robert L. Evans
1903 2nd Street, N.W.
Washington, D. C.

"Dear Mr. and Mrs. Evans:

"In view of the continued unsatisfactory condition of your real estate loan here due to past due installments and unpaid taxes, we

are forced to require that this loan be paid off in full on or before the close of business March 28, 1958.

"We hope that you will comply with this request.

"Very truly yours,

"B. Doyle Mitchell
President."

* * * * *

58 (Thereupon, letter dated June 9, 1958, was marked Defendant Mitchell's Exhibit 2, for identification, and received in evidence.)

MR. HAYES: With Your Honor's permission, I would like to read it.

(Reading)

"Mr. Robert L. Evans
Mrs. Lucille W. Evans
1903 Second Street, N.W.
Washington, D. C.

"Your real estate note which we hold is nine months in default. We, therefore, are demanding that you make the payment of $990 on the note, $236.01 on taxes, $84 insurance on or before 2:00 P.M. on
59 June 17, 1958, total $1,310.01. Failure on your part to make this payment will give us no alternative but to advertise the property securing this loan for sale without further notice to you.

"It is further requested that all future payments be made on the date due to avoid further notices of this type.

"We hope that it will not be necessary for us to take drastic action."

* * * * *

60 (Thereupon, Defendant Mitchell's Exhibit No. 3 was received in evidence.)

MR. HAYES: (Reading.)

"Mr. and Mrs. Robert L. Evans
1903 2nd Street, N. W.
Washington, D. C.

"Dear Mr. and Mrs. Evans:

"With regards to the property at 1724 7th Street, N.W. we wish to inform you that no consideration will be given to your request to

refinance due to past and present conditions.

"Since our request of February 28, 1958 has not been complied with, we must insist that our request of June 9, 1958 be met. The final date on the latter was June 17, 1958. Action will be taken in event of non-compliance with our letter of June 9, 1958, before 2:00 P.M. June 23, 1958.

"We hope this action will not be necessary."

* * * * *

61 (Thereupon, letter dated September 29, 1958, was marked Defendant's Exhibit No. 4, for identification.)

MR. HAYES: (Reading.)

"September 29, 1958.

"Mr. and Mrs. Robert L. Evans
1903 2nd Street, N.W.
Washington, D. C.

"We have been advised that you have not completed settlement on your real estate case #411884 at the District Title Insurance Company, 1413 Eye Street, N.W.

"In view of the above fact, we are demanding that you complete settlement on this case no later than the close of business October 3, 1958, or we will be forced to cancel this case.

"We hope that this will not be necessary.

"Very truly yours,

"B. Doyle Mitchell,
President."

* * * * *

62 (Thereupon, letter dated October 21, 1958, was marked Defendant Mitchell's Exhibit No. 5 for identification.)

MR. HAYES: (Reading)

"October 21, 1958.

"Mr. and Mrs. Robert L. Evans
1903 2nd St., N.W.
Washington 1, D. C.

"Dear Mr. and Mrs. Evans:

"In view of the fact that you have not completed settlement at the District Title Insurance Co. in case #411-884 regarding the property at 1724 7th Street, N.W., we have requested that this case be cancelled and that the papers be returned to us in accordance with our letter of October 15, 1958 of which you have received a copy.

"Because of the very unsatisfactory status of the existing loan which we are holding on the same property, we must insist that the sum of $1210 for the 11 monthly payments in arrears plus $236.01 for 1957 taxes and $74.40 due Thomas J. Owen & Company for a
63 grand total of $1,520.41 be paid at or before 2:00 P.M. October 31, 1958, in order to avoid foreclosure on this real estate.

"We hope that you will complay with this demand in order to avoid such action.

"Very truly yours,

"B. Doyle Mitchell, President."

* * * * *

102 Washington, D. C.
Wednesday, May 8, 1963.

* * * * *

106 (AT THE BENCH:)

MR. DODSON: Among other things in the pre-trial statement we said should be admitted without further proof were records and exhibits which were in the case in the Municipal Court. These are the records which were in the case in the Municipal Court. I think they are admissible.

MR. HAYES: But they are not admissible without objection. Nobody precludes themselves from the right to object to the admission of a document.

THE COURT: It is the ordinary procedure and agreement in the pre-trial hearing that exhibits will not require formal proof. General objections are preserved. But I haven't heard the objection.

107 MR. HAYES: I am about to make that, if Your Honor pleases. We want to object to any exhibits which come after the time that the foreclosure was had.

It is our position that this being a rightful foreclosure that once the foreclosure was had then the question of what was done so far as the conduct of the property is concerned is a matter with which plaintiffs would not then be in interest.

THE COURT: The Court's view of these matters is that the Court normally permits counsel to make their record based upon their theory of the case.

If the Court understands the theory correctly on which the plaintiff is proceeding it is that the foreclosure was brought about in the face of a conspiracy between the trustee and the purchaser at the foreclosure sale, by which those two parties conspired to take over this property and that the taking over of this property was fraudulent in that it was the result of a lulling of the plaintiff into a false sense of security, let's say, by representing to the plaintiff that the foreclosure would not take place if the plaintiffs were able to lift certain liens on the property which the plaintiff asserts the defendant assured him he would permit to be lifted and he acted upon that assurance; and that subsequent to the foreclosure the property was taken over in the name of the individual who is not a real party in interest but was acting for one of the alleged conspirators

108 and in conjunction with him as a conspirator.

The action between the party who took over the property in his name and the other conspirator resulted finally in placing the title of the property in one of the conspirators other than the one who took the property over his name, all to the damage of the plaintiffs.

I trust I have tried to analyze this matter as best I can. I will stand corrected by plaintiffs' counsel if that does not correctly state his position.

MR. DODSON: That states our position with the added point that most of these things happened after the foreclosure which proved the conspiracy. We couldn't prove it without them.

THE COURT: I was going to add: This is introduced in alleged substantiation of the arrangement I referred to, alleged by the plaintiff.

MR. DODSON: That's right.

MR. HAYES: Let me say this, and then Mr. Thomas, I am sure, wants to say something with respect to it.

First of all, at least at this stage, and I know we can't prove it all at one time, but at this stage there has been no such showing as Your Honor indicated.

Secondly, the fact is, as we conceive it, and this is the theory of our case, that up until now their proof has demonstrated that this fore-
109 closure was the result of defaults on the part of the plaintiffs; that these defaults have been themselves testified to and therefore, the trustees had a right and obligation to foreclose.

With respect to any alleged moratoriums, Your Honor ruled that wasn't a part of it, and when we offered our communications Your Honor said they had the right to explain the situation giving rise to those communications. It is our position that nothing in any such explanation did give rise or has given rise to any basis for any alleged moratorium.

The cases, we believe, hold that there is a distinction and a definite one between whether or not they are proceeding on a wrongful foreclosure or a foreclosure which is a rightful one but has not been properly executed.

We ask at the outset that there be an election made with respect to this. The suggestion was to allow the matter to proceed until there was evidence as to what the situation was.

I call attention now to the fact that the evidence specifically does show there was a default. The testimony so far is that the bank made the loan; that Mr. Mitchell, as president of the bank, indicated he would see what a committee would do with respect to this situation; that the committee would not go along with the situation. There was no attempt on their part to do anything with respect to the foreclosure and the ques-
110 tion is, it is a rightful foreclosure, and the cases say where it is a rightful foreclosure they cannot introduce subsequent happenings in which the plaintiffs would be in interest.

MR. PHILIP THOMAS: If Your Honor please, Mr. Dodson, according to the record, his theory is wrongful foreclosure. That is in the record of yesterday. If that be true, the matters he is going into now would be irrelevant and immaterial because under a wrongful foreclosure he has to first show there was no default or breach of the condition of the trust.

On that issue alone his only other position could be under the cases there was a rightful foreclosure improperly executed, in which case the Courts have held that an action at law will not lie for damages, where the foreclosure was rightful but improperly executed. The remedy complained of in such a case is to have the sale set aside.

Once he elects to take the position it was a wrongful foreclosure and the evidence shows under the deed of trust there was a default which automatically gave the trustee the right to proceed, it is a different proposition, and that is the state of the record made now under which he is proceeding.

It was a wrongful foreclosure and he stated that at the bench yesterday. It is in the record.

THE COURT: What is your position?

111 MR. DODSON: My position is that that is not the fact.

THE COURT: What is not the fact?

MR. DODSON: That my position is that this was a wrongful foreclosure. I do not take that position.

My position is that we have a case where the trustee has dealt for his personal benefit with the property and that is a violation of the rights of the plaintiff, and the cases hold we have an election to set aside the order.

THE COURT: In what respect has he dealt wrongfully with the property?

MR. DODSON: He bought it for himself.

THE COURT: Your contention is that the foreclosure was proper --

MR. DODSON: I am not saying that the foreclosure was proper. I said the foreclosure may be proper in view of the understanding these

people had. As to that the Industrial Bank is the only party bound by res adjudicata by the case in the Municipal Court, which apparently held -- we can't testify what they did hold but there was a finding against them. There was no question there was a deficiency.

THE COURT: The Court is not familiar with the issues in the case in the Municipal Court.

MR. DODSON: It will be in this case. I have that record.

112 MR. HAYES: The Municipal Court case could in no sense prove this situation.

MR. DODSON: Oh, yes. You are bound by the doctrine.

THE COURT: It is only proper for the Court to ask you at this time to state specifically the theory on which you seek to proceed in this case. There are two positions referred to by counsel for the defendant.

One position is that the plaintiff alleges that the foreclosure was an invalid foreclosure.

The other one is that the foreclosure was proper but that even though it was proper plaintiff suffered some loss as a result of it because of conspiracy on the part of some persons to defraud him in connection with the proper foreclosure, by improper action on the part of the trustee in violation of the trustee's obligation. I don't know which side of the coin --

MR. HAYES: And on the one hand there would be a right of proceeding in equity and redemption and the other the cases hold there cannot be this tort action.

Mr. Dodson said, "We come up now --" and I am reading from page 26 of yesterday's record.

MR. DODSON: What page?

MR. HAYES: Page 26. It is near the bottom of the page.

113 (Reading.)

"We come up now, if Your Honor please, to the proposition here and it goes right to the heart of our case, as we claim that this was a wrongful sale to the foreclosure, and the sale that was made was voidable and we are now challenging it and if the jury

finds this man didn't have a bona fide sale, then we would be entitled to have the income during this period."

He was talking about income.

MR. DODSON: That's right.

MR. HAYES: But this expresses the theory of his case that this was a wrongful foreclosure.

If that be his position, if he is advancing the theory that it was a wrongful foreclosure, under the cases I say he doesn't have a right to this cause of action.

The cases hold and all the testimony was that this foreclosure was had based upon the default which gave the trustees the right to proceed. The cases state there must be something to void the right of the trustee to sell.

THE COURT: This was made the subject of a motion for summary judgment?

MR. DODSON: That's right.

THE COURT: Wasn't it?

MR. DODSON: Yes, sir, it was. They filed a motion for summary judgment.

114 THE COURT: What was the question raised on the motion for summary judgment and what was the ruling of the Court, which this Court feels would be binding upon it?

I haven't read the entire points and authorities that were submitted in connection with the motion for summary judgment. There was a motion for summary judgment without setting forth any reasons for it?

MR. DODSON: That was one of the reasons.

MR. HAYES: You will see in the motion that we were not in the position we are now.

MR. DODSON: We are not finished with the case yet.

MR. HAYES: Of course we are not. I am trying to make my motion seasonably.

THE COURT: You contend the statements made by counsel for the plaintiff in his opening statement to the jury are at variance with the issues?

MR. HAYES: No, sir. This is a statement made before Your Honor at the bench.

MR. DODSON: There was certain evidence that would come during the interim period.

MR. HAYES: We asked him to make the decision and he said this was the crux of the case. Today he says, "We are proceeding on a theory of wrongful foreclosure."

MR. DODSON: I didn't say that.

115 MR. DODSON: I was speaking about admissibility of this element of damages, bringing in the loss of income during the four year period.

MR. HAYES: You can't change your statement because of what you are talking about. "We claim that this was a wrongful sale."

I believe that is the heart of our case.

MR. DODSON: I was talking about the damages being the crux.

THE COURT: What is your position?

You contend the foreclosure was invalid because of a defect in the foreclosure, or do you contend the foreclosure itself was proper but that the sale was invalid because it was made to a straw --

MR. DODSON: I claim both.

MR. HAYES: You can't.

MR. DODSON: Oh, yes.

THE COURT: The position taken by the defendant is that it is one or the other. You can't have your cake and eat it.

MR. DODSON: It is both.

THE COURT: That the foreclosure was good and also bad?

MR. DODSON: No. That the foreclosure was not good and the trustee proceeded to deal in trust property and take it.

116 Those are the items of my damages.

THE COURT: On what theory do you proceed on your contention that the foreclosure was invalid?

MR. DODSON: We couldn't bring up any moratorium but they are estopped to deny the agreement these people had.

THE COURT: These people had?

MR. DODSON: The testimony of this witness and the other witness. He kept them constantly informed and told them he would complete the file, and she testified as late as November 6th, and the foreclosure wasn't advertised until the 21st -- that didn't come out yet but it will -- that they had settled the tax lien. Then, at the sale the testimony will show they violated the published terms of the sale; that they sold to an alleged man without a dime, by deeding to him the property without a dime.

I think those are all facts which spell out a conspiracy which existed prior to the sale. I can't bring all of that in at one time. I have to bring it in piece by piece to make the crossword puzzle fit. These are bits of the crossword puzzle.

MR. HAYES: All he has said doesn't change the situation that if, as a matter of fact there was a default and the trustees had the right to sell, he has to indicate one thing or the other. He can't say both things: That they had a right to sell and did not have a right to sell.

117 If they had a right to sell, the cases hold it goes into an equity court, he sets the sale aside and goes ahead and proves it, but the cases hold that where there is a rightful sale he cannot base it on an alleged tort action.

MR. DODSON: In Holmes versus Ryan, and there is a later case, 105 or 106 Appeals, they said they may either sue to have the thing set aside or sue for damages.

THE COURT: You are referring to cases that do not come often before the Court and the Court would have to base its ruling on a consideration of the authorities relied upon by counsel on the opposing sides.

If we come to a crucial point where the future progress of the case is dependent on the Court's ruling on this issue it seems the matter should be gone into by the Court in a more thorough manner than the Court is able to go into it at the bench conference.

I think I understand your respective positions but I haven't had an opportunity to examine any authorities you rely upon.

Your contention is that this suit cannot be proceeded with as a tort suit for damages. Of course, I would be influenced by any authorities that bear upon that issue.

MR. DODSON: That issue has already been resolved against them in their motion for summary judgment. That is one of the issues they raised.

118 THE COURT: That is what I inquired about. The defendant said the posture of the case at summary judgment was such that the issue could not be raised.

MR. HAYES: That is right.

MR. DODSON: The posture could not be changed.

THE COURT: What is the difference then and now as far as the law issue is concerned?

MR. THOMAS: As Your Honor well knows, on a motion for summary judgment where there are facts involved and in issue summary judgment will not lie.

THE COURT: But summary judgment was denied in this case.

MR. DODSON: Sure it was.

THE COURT: Who did this come before?

MR. THOMAS: Judge Walsh.

THE COURT: Did he write an opinion?

MR. DODSON: Yes, sir.

MR. THOMAS: I don't think he wrote it on that.

MR. DODSON: Have you got the record there?

(The file jacket was handed to the Court.)

THE COURT: Memorandum of points and authorities in support of motion to dismiss or in the alternative for summary judgment. What enlightenment does that give us?

MR. DODSON: I think it gives us the Judge's ruling. I can find it, I think. I think the Judge sent a memorandum opinion.

119 MR. THOMAS: The defendants first filed a defense under Rule 13 with respect to a counter-claim, taking the position that this matter should have been raised by counter-claim in the Municipal Court suit. That answer was stricken on the ground that the Municipal Court did not have jurisdiction of the amount of this suit. Then he filed a motion to amend showing that the District Court and the Court of Appeals here

have taken the position in such matters where the counter-claim is beyond the jurisdiction of the Municipal Court the proper procedure in order to give effect to Rule 13 is for the counter-claimant to file its claim in the District Court and then have a stay in the Municipal Court pending the action here.

Now, the Court in the Municipal Court suit denied the right to amend. Therefore, the point that would have been decisive on the summary judgment has been ruled out of the case because the counter-claim issue under Judge Walsh's ruling was out of the case, leaving it in such posture that the question with reference to fraud was still in. Consequently, summary judgment would not lie.

THE COURT: Did Judge Walsh reduce the opinion to writing?

MR. THOMAS: Mr. Dodson said he did. I say he didn't on that point.

120 MR. DODSON: I think we have a written memorandum by the Judge himself.

He sent an order but didn't give any particular reason, but denied the motion for summary judgment.

MR. HAYES: Of course he denied the motion for summary judgment.

MR. DODSON: It wasn't only on that limiting ground Mr. Thomas speaks about but they went into all this question about the right to pursue this kind of action rather than seeking to enforce judgment of redemption. All of that is in their motion, which was prolix.

MR. HAYES: A motion for summary judgment will not lie if there is a factual question.

THE COURT: The Court's order was that defendant's motion for leave to file supplemental memorandum of points and authorities in support of summary judgment be granted, and that the motion for leave to file amended answers be denied, and that defendant's motion to dismiss or in the alternative for summary judgment be and the same are denied.

So that the summary judgment motion filed by the defendants was denied.

MR. HAYES: Yes, Your Honor. But that would not be anything beyond the fact that the Court found there was not a basis for summary judgment; that a factual issue existed --

121 THE COURT: He doesn't indicate.

MR. HAYES: No, sir. I am saying that.

MR. DODSON: Look back there and see the grounds they gave for summary judgment and see if it isn't every ground they mentioned at the bench. Do you deny that?

MR. HAYES: Sure. The fact is that we are in an entirely different posture as we stand before you now. The proof is before you now with respect to this situation. Your Honor has their proof which we submit substantially shows this was a rightful foreclosure.

MR. LAWSON: For my defendant I adopt all of that but this man testified he was ten or eleven months in arrears. I think we are wasting time proceeding in this case until that question is resolved. Mr. Dodson cannot play both ways. He ought to say it is or is not a good foreclosure. We are wasting time until that is resolved.

MR. DODSON: I think that is a question for the jury to decide. It is a factual question.

THE COURT: What is a factual question?

MR. DODSON: Whether it was a good or not foreclosure. That is a question of fact for the jury.

THE COURT: How would the Court instruct them on that, leaving them to pass on whether or not it was a good or bad foreclosure?

122 MR. DODSON: Whether they were estopped after making the assurance they were going to give them a chance to remove the tax lien. That is a question of fact.

Then, with respect to this other thing, if there was a pre-conceived scheme on the parties to get hold of the property after they got word the government is going to take it. That is when the attitude changed in this case: When Mitchell found out the government was going to take it and every step he takes after that -- think of a man, eleven days after foreclosure he puts the electrical meters in his name, and the gas meters,

collects the rent and puts it in the name of [a] man who doesn't have a dime.

The Court has talked about the duties of the trustees, but here a man not only has an interest in the bank but does it for his own personal benefit.

MR. THOMAS: But the foreclosure was right or wrongful.

MR. DODSON: That hasn't anything to do with it.

MR. THOMAS: We have cases to support it; that say he has a right to foreclose.

MR. DODSON: He can come in Court and do one of two things. Either set aside --

MR. HAYES: That is not a fact.

MR. DODSON: They do the following.

MR. LAWSON: I think the Court should decide.

123 THE COURT: I think you are pursuing it in two manners.

MR. DODSON: They are not inconsistent and I would have a right to bring as many facets as I can. Suppose the jury takes the position the man was premature in his foreclosure. And then, take the other position: Suppose they don't. We could still have a conspiracy.

MR. THOMAS: How could they, when they were thirteen months in arrears?

MR. DODSON: That hasn't anything to do with it.

MR. THOMAS: It does.

THE COURT: I think it is a legal question whether or not the foreclosure should be permitted to proceed. The question is a legal one: Whether the defendant had a right to proceed with the foreclosure.

The moratorium feature has been ruled out of the case.

There is this question, it seems to the Court. This foreclosure took place and it is alleged that the trustee in conspiracy and in conjunction with the conspirators acted in violation of his trust by taking the property in his own name for the purpose of his own aggrandizement, as I understand the theory.

MR. DODSON: That is the theory.

124 THE COURT: If you want to proceed on that theory I assume that would be your course of procedure and we will work out the case on that basis.

MR. DODSON: I will proceed on that theory and take objection to the ruling.

THE COURT: Have I made myself clear, as I view the situation?

MR. THOMAS: Yes, but we now make it a little more definite, Your Honor.

Our position is, under the complaint with respect to conspiracy, that it was pre-arranged, in order for him to proceed on that theory plaintiffs must show that this conspiracy was pre-arranged prior to any default on the deed of trust because the law is that the trustee has a right to proceed upon default and the testimony shows they admitted they were twelve or thirteen months in default. The trustee had a right to proceed. He charges it was a wrongful procedure.

THE COURT: No, I do not take it that that is the situation.

As I analyze the matter, in view of the record in this case and the ruling of the pre-trial Judge, the plaintiff must proceed on the theory that the foreclosure was a justifiable foreclosure. That is to say that the trustee had a right to proceed with the foreclosure but that in doing

125 so he violated his trust and he did so in conjunction with others who acted with him in furtherance of his conspiracy to defraud plaintiff, to the plaintiffs' damage and the defendant's enrichment.

MR. THOMAS: Then, I take it, his theory is it was a rightful foreclosure improperly executed. If he wants to take that position, O.K.

THE COURT: I don't believe you can take both positions.

MR. HAYES: I was about to say the same thing.

THE COURT: You can't take the position it was a wrongful foreclosure and a rightful foreclosure.

MR. DODSON: The Court may force me into that position.

THE COURT: In other words, the right to foreclose on a defaulted trust existed but the obligation rested on the trustee to proceed in accordance with his obligation as trustee.

MR. THOMAS: That is right.

THE COURT: And if he did not do so and proceeded in conjunction with others by way of conspiracy or in furtherance of a conspiracy to his own benefit and profit and to the detriment of the plaintiff, the plaintiff would have a cause of action under that theory.

MR. THOMAS: That is right.

MR. DODSON: Undoubtedly that is part of my case and if the Court takes the position that I may not proceed on the other by making my position on the other -- and I will not belabor the point with the Court -- but

126 one of the prongs of my complaint is conspiracy by the improper action of the trustee in carrying out his duties under the trust. There is no question about that.

MR. LAWSON: Do I understand the Court ruled in effect that this foreclosure was valid?

MR. DODSON: He hasn't ruled.

THE COURT: The defendant proceeded with the foreclosure and the right to foreclose was based on the facts shown in the record, but when he proceeded and the sale took place the claim is he violated his obligation as trustee by taking property in his own name and thereby benefitting himself.

MR. LAWSON: That still gives him two shots at it. It seems to me it should be unequivocally clear now that this was or was not a valid foreclosure. Otherwise, we don't know what to defendant or how to object if he is going to pursue both.

I think it means adjournment of this case until the question is decided.

THE COURT: I don't think adjournment is needed.

I have stated that the situation is that the defendant had a right to proceed with foreclosure but that the obligation of the trustee was to proceed in accordance with his obligation as trustee impartially and that in taking the property in his own name and proceeding in that manner in conjunction with others who acted with him for his benefit -- that is, the

127 individual who took as a straw -- that that was in pursuance of the

conspiracy and that was to the damage of the plaintiff.

MR. THOMAS: That would be rightful foreclosure improperly executed and I think he should elect, if Your Honor please.

MR. HAYES: His Honor is indicating the election has been made.

MR. DODSON: No, don't get that in the record.

THE COURT: I am just saying you must proceed in one or the other manner and the Court's feeling is that you cannot proceed in both.

MR. DODSON: And the Court is doing that.

THE COURT: Yes, sir, and the Court is putting it up to you.

MR. DODSON: I am saying I feel I have the right, and for the record, to proceed along both lines, but the Court is ruling I may not do the two. I will proceed along the lines the Court indicated, which are the only lines I may proceed on.

I am still reserving my objection to the ruling of the Court in that particular.

THE COURT: We will proceed on that basis: That the foreclosure was a valid foreclosure and the right of the defendant existed to foreclose, but that the foreclosure and sale violated the plaintiff's rights in that he

128 violated his duty as a trustee by taking the property in his own name.

MR. THOMAS: If Your Honor please, we just want to get our position clear in the record: That if the plaintiff proceeds under the theory it was a rightful foreclosure improperly executed then our position is this action at law will not lie; second, the only remedy he had was in equity to have that type of sale set aside, and they are inconsistent remedies.

MR. HAYES: And third, Your Honor, evidence tending to show what happened after the time of foreclosure is not properly admissible under that theory.

THE COURT: I know your point.

MR. HAYES: We reserve the point.

THE COURT: You reserve the point. You may proceed with this witness.

MR. DODSON: To introduce evidence?

THE COURT: Yes.

* * * * *

165 LUCILLE W. EVANS

the plaintiff, resumed the stand, and having been previously duly sworn, was examined and testified further as follows:

* * * * *

178 CROSS EXAMINATION (Resumed)

BY MR. HAYES:

Q. Mrs. Evans, can you tell me when you first came to be in default on this note at the bank? A. All I know is what was read, it was 13 months in default when the property was sold, December the 1st, so that probably would put it back to October.

Q. So that from October, 1957 you had not made payment on account of this obligation; is that right? A. As far as I know. * * *

* * * * *

186 Q. * * *

Handing you Exhibit No. 3, which exhibit I just handed to you, you said:

"Yes. We received the original of this.

"Q. And after the receipt of that letter on or about June 19, do you recall whether you had any conversation with Mr. Mitchell about that letter?

"A. I did.

"Q. Will you tell us where this conversation took place?

"A. I talked to him over the phone, --"

A. Yes.

Q. You say yes. Do you mean now that you -- that your recollection again is refreshed and you didn't go to the bank? A. I talked with him over the phone at that time, that is true.

Q. Now which is true? A. The statement you just read.

Q. That you talked to him over the phone? A. Yes.

187 Q. And that you didn't go to the bank? A. I didn't go to the bank.

Q. All right. Now, at that time did Mr. Mitchell indicate to you what he was going to do? A. He didn't tell me exactly, but he led me to think that we may be able to make some plans or some consideration.

Q. Now when you say "we," may be able to, did he indicate who the "we" was? A. No, he was considering the loan, but he didn't say exactly, he didn't give me a definite answer, no.

Q. Well did he indicate what he intended to do? A. No, not exactly. I mean, he didn't give me any definite terms, I didn't sign any paper.

Q. You say that he indicated to you he was going to try to do what he could; is that right? A. Yes.

Q. Did he indicate to you how he was going to do what he could?
A. Well the only thing we were discussing was a loan.

Q. Well did he say what he was going to do about the loan?
A. The only thing we discussed was whether he would put the loan back on the property or not.

188 Q. Well, did he indicate to you, madam, that he was going to have to take it up with somebody? A. Yes.

Q. And he indicated to you at that time, didn't he, that he would do what he could but he would have to take it up with his committee; is that right? A. Yes.

Q. Did he tell you what committee he was talking about? A. I don't recall that he did.

Q. But he did tell you that he had to take it up with a committee?
A. I believe so.

Q. And did he after that time advise you that the bank was willing to make the loan? A. He advised us through a written letter, a written statement, which I was to sign.

Q. And did you sign such a statement? A. Yes, I believe I did, yes. That seems, as far as I know, that was in July, June or July, I don't remember. I know it came there, and I suppose if we got the loan, and he did put the loan on, I must have signed.

Q. Well, after the time then that you had this conversation with him, and he told you he would take it up with his committee, he thereafter gave you something to evidence the fact that you wanted this loan

189 for the $13,500? A. Yes.

Q. And you and your husband signed this application, did you? A. As far as I remember. I know it came, and if we got the loan, I must have signed it; is that right?

Q. Would you say -- A. I was asked to sign, my husband asked me to sign. As far as I remember, we signed it and carried it back, but I'm not clear on thatpoint now, it's been five years.

Q. You don't have any independent recollection of having signed it? A. I don't, I really don't, but I know that the loan was put up, so therefore I figure I signed it, I must have. I know it came, I remember reading it.

My husband didn't --

MR. DODSON: Don't volunteer anything.

THE WITNESS: Excuse me, I won't volunteer anything.

BY MR. HAYES:

Q. Your husband didn't what? A. I'm sorry, I would like to retract that statement, please.

Q. Yes, ma'am.

190 I show you this, and ask you whether or not this instrument was signed by you.

THE COURT: When you say "this", it isn't clear.

MR. HAYES: Yes, Your Honor. A communication, a document, addressed to whom it may concern, dated August 20, 1958.

THE COURT: Is that an exhibit?

MR. HAYES: It is not an exhibit at this time, if Your Honor please.

THE COURT: Thank you.

BY MR. HAYES:

Q. Is this the signature of yourself and your husband? A. This is the one.

Q. This is the one to which you make reference? A. That's right.

Q. Now this is dated August 20, 1958. A. Well, I said to the best of my recollection, I can't remember dates very well.

Q. Well, you mean that this came as a result of the letter of June 19th? A. Well, all of that time we were constantly in touch with Mr. Mitchell, and we were discussing this matter. And after I, if I may say, the house was not completed after the second fire, before July -- sometime in July, and it was then that Mr. Mitchell and his committee went through the house and we examined it and it was then that they decided

191 to make this, but we had talked about this and discussed it for quite some time.

Q. Now at this time you were in default on your note from October up until this time; is that right? A. I think so.

Q. And the bank, according to this, was making an arrangement to allow you to borrow from them $13,500 to meet this situation; is that correct? A. This is what we asked for, yes.

Q. Now to your knowledge was the money sent to the title company? A. Yes, it was.

Q. This $13,500 was sent to the title company? A. That is right. We went down for settlement.

Q. And was it in the search of title in respect to this that it was disclosed that you and your husband had outstanding tax liens? A. I suppose so.

Q. And you have something about $600 as being the tax lien. That isn't correct, is it? The tax lien wasn't for $600, was it madam? A. It was much more than either of those figures at first, but at this time, according to what was read this morning, it was eight-hundred and

192 something. I made that error, but I have been paying on it for a little while.

Q. But the tax lien was some $820 at the time? A. At the time, I believe.

* * * * *

**EXCERPTS FROM**
**DEFENDANT MITCHELL'S EXHIBIT NO. 5**

[Filed May 20, 1959]
IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

| | | |
|---|---|---|
| INDUSTRIAL BANK OF WASHINGTON<br>11th & U Streets, N. W.<br>Washington, D. C.<br>A Corporation<br><br>Plaintiff | : | |
| vs. | : | Civil Action No. M15174-'59 |
| ROBERT L. EVANS<br>1300 Somerset Place, N. W.<br>Washington, D. C.<br><br>and<br><br>LUCILLE W. EVANS<br>1300 Somerset Place, N. W.<br>Washington, D. C.<br><br>Defendants | : | |

**COMPLAINT FOR DEFICIENCY JUDGMENT**

1. This Court has jurisdiction under Sections 11-703 and 11-755, D. C. Code 1951 as amended, the amount in controversy being less than $3,000.00.

2. The plaintiff is a corporation organized under the laws of the District of Columbia and is engaged in the business of banking in the District of Columbia and is suing in its corporate capacity as the holder of a promissory note.

3. The defendants are adult residents of the District of Columbia and are being sued jointly and severally in their individual capacities.

4. On or about April 1, 1954 the defendants borrowed the sum of $14,000.00 from the plaintiff and executed a promissory note whereunder they jointly and severally became obligated to pay to the order of the plaintiff the sum of $14,000.00 with interest until paid at the rate of five percentum per annum, said principal and interest being payable in

monthly installments of $110.00 beginning May 1, 1954 and continuing until April 1, 1964 when the balance then remaining unpaid would become due and payable. The said note contained an acceleration clause which provided:

> "And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same shall become due and payable, then and in that event, the unpaid balance of the aforesaid principal sum and accrued interest shall at the option of the holder hereof at once become and be due and payable."

5. The aforesaid promissory note was secured by a deed of trust executed by the defendants herein on April 1, 1954 and recorded on April 1, 1954 in Liber 10166 at Folio 295 in the Office of the Recorder of Deeds for the District of Columbia, wherein the defendants conveyed real estate described as Part of Original Lot 10 in Square 419 in the District of Columbia improved by premises 1724 7th Street, N. W. to Jesse H. Mitchell and B. Doyle Mitchell, Trustees.

6. The defendants defaulted in payment of their obligations under the aforesaid promissory note prior to January 1, 1958 and remained in continuous default. Numerous demands were made upon the defendants by the plaintiff to make the account current by paying principal and interest then due, which demands were not complied with. The plaintiff as holder of the note elected to declare the unpaid balance of the aforesaid principal sum and accrued interest immediately due and payable, has demanded payment, and payment was not made.

7. Thereafter and under the terms of and in compliance with the aforesaid promissory note and the aforesaid deed of trust securing said promissory note the security property was sold by B. Doyle Mitchell, surviving trustee, at public auction on December 1, 1958 to Waddell R. Thomas at and for a price of $12,300.00. After crediting the defendants with the gross proceeds of the sale and charging against the defendants all items of expense properly chargeable to them and the unpaid balance

of the principal sum and accrued interest there remains a deficiency of $1,518.19 unpaid, due and owing by the defendants to the plaintiff on account of the promissory note aforementioned. Plaintiff has demanded of the defendants that this deficiency be paid, which demands have not been complied with.

WHEREFORE, the premises considered, plaintiff demands judgment against the defendants and each of them jointly and severally in the sum of $1,518.90 plus interest and costs.

INDUSTRIAL BANK OF WASHINGTON
A Corporation
By:

/s/ B. Doyle Mitchell
B. Doyle Mitchell
President

DISTRICT OF COLUMBIA, ss:

B. Doyle Mitchell, being first duly sworn on oath according to law deposes and says that he is the President of the Industrial Bank of Washington, the plaintiff herein, he has read the foregoing complaint by him subscribed as President and knows the contents thereof, that he has examined the records of the corporate plaintiff and knows that according to the said records the facts stated in the complaint are true; and affiant further states that the foregoing is a just and true statement of the amount owing by defendants to plaintiff, exclusive of all set offs and just grounds of defense.

/s/ B. Doyle Mitchell

Subscribed and sworn to before me this 19th day of May, 1959.

[SEAL]

/s/ Virginia D. Peters
Notary Public, D. C.
My Comm. expires 6/14/62.

COBB, HOWARD, HAYES & WINDSOR
613 F Street, N. W.
Washington, D. C.
By:
/s/ George E. C. Hayes
/s/ George H. Windsor
Attorneys for Plaintiff

[Filed Aug. 14, 1959]

## JOINT ANSWER OF ROBERT L. EVANS AND LUCILLE W. EVANS AND COUNTERCLAIM

The joint answer of Robert L. Evans and Lucille W. Evans respectfully represents unto the Court as follows:

### FIRST DEFENSE

The complaint fails to state a cause of action upon which relief may be granted.

### SECOND DEFENSE

1, 2, 3, 4 & 5. The defendants admit the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the complaint except insofar as they recite a so-called "acceleration clause," as to which these defendants have no knowledge and demand strict proof of the same, if material.

6. The defendants deny so much of paragraph 6 as alleges that they had defaulted in their obligations under the note described in said complaint and aver that they had been extended a moratorium by the plaintiff and were actually in process of re-financing the property when the plaintiff disregarding its obligation and agreement with the defendants plunged the defendants' property into foreclosure.

7. The defendants deny the allegations of paragraph 7 of the complaint.

Further answering paragraph 7 of the complaint, these defendants aver that the surviving trustee, B. Doyle Mitchell, did not conduct a bona fide sale of said property; that the alleged purchaser, one Waddell R. Thomas, was the agent, tool and the straw of the trustee, B. Doyle Mitchell; that, although the property has since been transferred by the straw party Thomas to one Robert M. Harris, who, in turn, is an agent, straw and tool of the trustee, B. Doyle Mitchell, the property is, in deed and in fact, owned by B. Doyle Mitchell, who is currently exercising control thereover.

Further answering said paragraph 7, the defendants aver that, by

reason of the duplicity of the trustee, B. Doyle Mitchell, the alleged sale was null, void and of no effect.

THIRD DEFENSE

The defendants aver that, because of the conduct of the trustee, B. Doyle Mitchell, who is also the President and agent of the plaintiff corporation, the plaintiff has knowledge of the matters related supra in the second defense and they are estopped from proceeding in this proceeding against the defendants.

FOURTH DEFENSE

The defendants aver that the sale alleged in the complaint was null, void and of no effect because of the conduct of the trustee, the agent, servant and employee of the plaintiff corporation.

WHEREFORE, having fully answered, the defendants pray to be dismissed hence with their costs.

/s/ Thurman L. Dodson
Attorney for Defendants
626 Third Street, N. W.
DIstrict 7-8000

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COUNTERCLAIM

ROBERT L. EVANS
LUCILLE W. EVANS

- v -

INDUSTRIAL BANK OF WASHINGTON
A Corporation

The cross-defendant is indebted unto these cross-plaintiffs for certain furniture and furnishings which personalty it has appropriated to its own use as a result of the alleged foreclosure sale and the cross-defendant is also indebted unto the cross-plaintiffs for a balance due on a heating plant which the cross-plaintiffs permitted to remain on the premises upon the assurance that the cross-defendant would refinance the property.

| | |
|---|---|
| Value of household furniture | $1,500.00 |
| Value of heating plant | 1,000.00 |
| | $2,500.00 |

WHEREFORE, the cross-plaintiffs claim from the cross-defendant the full sum of Two Thousand and Five Hundred Dollars ($2,500.00), besides costs of this action.

/s/ Thurman L. Dodson
Attorney for Cross-Plaintiffs

/s/ Thurman L. Dodson
Attorney for Defendants
and Cross-Plaintiffs

JURY DEMAND

The defendants demand a jury trial on the issue[s] raised herein.

/s/ Thurman L. Dodson

Copy of the foregoing mailed this 14th day of August, 1959 to George E. C. Hayes, Esquire, 613 F Street, N. W.

/s/ Thurman L. Dodson

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[Filed February 8, 1961]

Judgment on verdict on Pltf's original claim for Deft. and costs. Further, judgment on verdict for Deft. on Deft's counterclaim in the amount of $250.00 with interest at 6% per annum from date and costs.

Judge Richardson

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[Filed July 15, 1963]

**DEFENDANT MITCHELL'S EXHIBIT NO. 6**

# DEED OF TRUST

387017

---

Robert L. Evans
and
Lucille W. Evans

TO

Jesse H. Mitchell
and
B. Doyle Mitchell,
Trustees.

---

Received for Record on April 1 12:12 P.M. '54, and recorded in Liber No. 10166 at Folio 295, one of the Land Records for the District of Columbia, and examined by

John B. Duncan
Recorder

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Mail To:

Industrial Bank of Washington
2000 11th St N.W.
Wash DC

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## THIS DEED

Made this 1st day of April A.D. 1954, by and between Robert L. Evans and Lucille W. Evans, his wife, as Tenants by the entirety, both of the City of Washington, District of Columbia, parties of the first part, and

Jesse H. Mitchell and B. Doyle Mitchell, Trustees, also of the City of Washington, District of Columbia, parties of the second part:

**WHEREAS**, the said parties of the first part are justly indebted to INDUSTRIAL BANK OF WASHINGTON in the full sum of FOURTEEN THOUSAND AND NO/100 ($14,000.00) Dollars borrowed money on the hereinafter described land and premises for which they have executed and delivered their one certain promissory note bearing even date with these presents, payable to the order of the said INDUSTRIAL BANK OF WASHINGTON, with interest from the date hereof at the rate of five per centum per annum, on said principal sum or on so much thereof as may from time to time remain unpaid, said principal and interest being payable in monthly installments of ONE HUNDRED TEN AND NO/100 ($110.00) Dollars, (with the privilege of making larger payments in any amount), each on the 1st day of each and every month after date, commencing May 1, 1954 and continuing until April 1, 1964, when the balance then remaining unpaid will become due and payable, -each monthly installment when so paid to be applied first to the payment of the accrued interest on the unpaid principal and residue thereof to be credited to said principal.

Said note has been identified by the Notary Public taking the acknowledgment to these presents as witness his notation on same.

**AND WHEREAS**, the parties of the first part desire to secure the prompt payment of said debt, and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, together with all taxes and insurance premiums as well as all renewals or extensions of said debt, including reasonable counsel fees incurred or paid by the said parties of the second part or substituted trustee or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and of all money which may be advanced as provided herein, with interest on all such costs and advances from the date thereof.

**NOW THEREFORE, THIS INDENTURE WITNESSETH**, that the parties of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America, to them in hand paid by the parties of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, have granted, and do hereby grant unto the parties of the second part, as trustees the following described land and premises, situated in the District of Columbia, known and distinguished as: Part of Original Lot numbered Ten (10) in Square numbered Four Hundred and Nineteen (419), described by following metes and bounds: beginning at a point on the West side of 7th Street, West, at the distance of 3 feet 8-3/4 inches North of the Southeast corner of said Lot 10; thence running North along the line of said 7th Street, 16 feet 6-1/4 inches; thence West 95 feet to a 10 foot alley; thence South along line of said alley, 16 feet 6-1/4 inches; thence East 95 feet to the place of beginning; together with all the improvements in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises.

**IN AND UPON THE TRUSTS, NEVERTHELESS**, hereinafter described; that is to say: IN TRUST to permit said parties of the first part their heirs or assigns, to use and occupy the said described land and premises, and the rents, issues and profits thereof, to take, have, and apply to and for their sole use and benefit, until default be made in the payment of the said note hereby secured or any installment of interest thereon, when and as the same shall become due and payable, or any proper cost, tax, or expense in and about the same as herein provided.

**AND**, upon the full payment of all of said note and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, counsel fees, charges, commissions, half-commissions and expenses, at any time before the sale herein provided for to release and reconvey the said described premises unto the said parties of the first part their heirs or assigns, at their cost.

**AND UPON THIS FURTHER TRUST**, upon any default or failure being made in the payment of said note or any installment of principal or interest thereon, or upon default in payment, on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs, counsel fees and expenses of this Trust, or on account of any such tax or assessment, or insurance or expense of litigation, or on account of any lien, Deed of Trust or Mortgage on said land and premises, prior in lien to this Trust, with interest thereon at six per centum per annum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax or assessment, or insurance, or expense of litigation, or such prior lien, Deed of Trust or Mortgage as aforesaid, the same may be paid by the holder or holders of said note and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then, upon any and every such default so made as aforesaid, the said parties of the second part, the survivor of them or the trustees acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisement as the parties of the second part the survivor of them or the trustees acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost, of the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales; FIRSTLY, to pay all proper costs, charges and expenses, including all counsel fees and costs herein provided for, and all moneys advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of the said sale or sales; SECONDLY, to pay whatever may then remain unpaid of said note whether the same shall be due

or not, and the interest thereon to date of payment, it being agreed that said note shall, upon such sale being made before the maturity of said note, be and become immediately due and payable at the election of the holder thereof; and, LASTLY, to pay the remainder of said proceeds, if any there be, to said parties of the first part their heirs or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

AND, the said parties of the first part do hereby agree at their own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid to keep the said improvements insured against loss by fire in the full sum of FOURTEEN THOUSAND AND NO/100 ($14,000.00) dollars, in the name and to the satisfaction of the parties of the second part, or substituted trustee, in such fire insurance company or companies as the said parties of the second part may select, who shall apply whatever may be received therefrom (whether by return short rate unearned premiums after foreclosure or otherwise) to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both general and special, that may be assessed against, or become due on said land and premises during the continuance of this trust and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.

AND, it is further agreed that if the said property shall be advertised for sale, as herein provided, and not sold, the trustee or trustees acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

AND the said parties of the first part covenant that they will warrant specially the land and premises hereby conveyed, and that they will execute such further assurances of said land as may be requisite or necessary.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

Signed, sealed and delivered in the presence of—

/s/ Robert L. Evans

/s/ Lucille W. Evans

UNITED STATES OF AMERICA

DISTRICT OF COLUMBIA, to wit:

I, Bernice M. Gordon, a Notary Public in and for the District of Columbia, DO HEREBY CERTIFY that Robert L. Evans and Lucille W. Evans, his wife parties to a certain Deed bearing date on the 1st day of April A.D. 1954, and hereunto annexed, personally appeared before me, in said District, the said Robert L. Evans and Lucille W. Evans, his wife being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

GIVEN under my hand and seal this 1st day of April, A.D. 1954.

/s/ Bernice M. Gordon

[Notarial Seal]

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[Filed June 12, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ROBERT L. EVANS, et al, Plaintiffs | : | |
| vs. | : | Civil Action No. 748-61 |
| B. DOYLE MITCHELL, et al, Defendants. | : | |

NOTICE OF APPEAL

Notice is hereby given this 12th day of June, 1963, that B. Doyle Mitchell [and] The Industrial Bank of Washington, Inc. hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of May, 1963 in favor of plaintiffs against said defendants #1 and #2.

/s/ George E. C. Hayes
/s/ George H. Windsor
/s/ Julian R. Dugas

Attorneys for Defendants B. Doyle Mitchell and the Industrial Bank of Washington, Inc.

Clerk:

Please mail copies to:

Thurman S. Dodson, Esq., 626 Third St., N.W.

Philip W. Thomas, Esq., 207 - Florida Ave., N.W.

Belford V. Lawson, Esq., 1725 - K St., N.W.

BRIEF FOR APPELLEES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,006

B. DOYLE MITCHELL
and
INDUSTRIAL BANK OF WASHINGTON, **Appellants,**

v.

ROBERT L. EVANS, et al., **Appellees.**

No. 18,007

WADDELL R. THOMAS **Appellant,**

v.

ROBERT L. EVANS, et al., **Appellees.**

No. 18,008

ROBERT M. HARRIS, **Appellant,**

v.

ROBERT L. EVANS, et al., **Appellees.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



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## STATEMENT OF QUESTIONS PRESENTED

The appellee's brief addresses itself to the questions presented by the appellants in their brief, heretofore filed herein.

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## STATUTES, MUNICIPAL COURT CIVIL RULES, FEDERAL RULES OF CIVIL PROCEDURE-MISCELLANEOUS

## MISCELLANEOUS

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,006

B. DOYLE MITCHELL
and
INDUSTRIAL BANK OF WASHINGTON, **Appellants,**

v.

ROBERT L. EVANS, et al., **Appellees.**

No. 18,007

WADDELL R. THOMAS, **Appellant,**

v.

ROBERT L. EVANS, et al., **Appellees.**

No. 18,008

ROBERT M. HARRIS, **Appellant,**

v.

ROBERT L. EVANS, et al., **Appellees.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR APPELLEES

## STATEMENT OF THE CASE

On, to wit, the 1st day of April, 1954, and for some considerable time prior thereto, the appellees were the record and beneficial owners of a certain parcel of land in the District of Columbia, known and described as Lot 832 in Square 419, improved by a certain premises known

and described as 1724 Seventh Street, N. W.; that said property was a valuable piece of commercial property valued at Forty Thousand ($40,000.00) Dollars, and was being used as investment property, with a store and dwelling units combined; that the appellees did seek and obtain a loan from the appellant, The Industrial Bank of Washington, in the amount of Thirteen Thousand Five Hundred ($13,500.00) Dollars, secured by a prior deed of trust, in which one Jesse Mitchell, now deceased, and B. Doyle Mitchell, an appellant herein, were named as trustees, said deed of trust having been duly recorded on the 1st day of April, 1954, and recorded among the land records of the District of Columbia; that thereafter the trustee, Jesse Mitchell, departed this life, leaving as the sole surviving trustee, the appellant B. Doyle Mitchell.

That, notwithstanding the duty imposed upon the trustee to faithfully execute his trust, appellant Mitchell did collude, conspire, contrive and combine wickedly and fraudulently with the appellants Waddell R. Thomas and Robert M. Harris, with the full knowledge and acquiescence of appellant bank, for whose interest the aforesaid Mitchell pretended to act in the incipiency to get control of, and ownership of, the property described in the complaint for his (appellant Mitchell's) own personal use and profit.

That in furtherance of the scheme of the conspiracy described above, appellant Mitchell, acting in his capacity as surviving trustee under the terms of the deed of trust referred to above, did in violation of his agreement with the appellees expose the appellees' property to foreclosure on the 1st day of December, 1959, and did, in furtherance of a preconceived scheme and conspiracy, purport to sell the property to appellant Thomas, in violation of the published terms of said sale, i.e., without a deposit; that the alleged sale to the appellant was not a bona fide sale, but was a device or scheme whereby appellant Mitchell was in fact and in truth acting for himself in violation of his obligations as trustee and in violation of law; that thereafter appellant Mitchell

caused the appellees' property to be deeded to appellant Thomas, in fee simple, without the aforesaid Thomas investing a solitary penny; that thereafter the appellant Mitchell, still conspiring with appellant Thomas, wickedly and fraudulently colluded and conspired with appellant Harris, and caused the aforesaid appellant Harris to be substituted as owner of the appellees' property in place and stead of appellant Thomas, who refused even to pay the settlement charges incurred as a result of his purchase of the property, insisting that appellant bank should assume said charges, which appellant Mitchell, acting for appellant bank, permitted appellant bank to assume; that the transfer to appellant Harris was a scheme and deceptive device used by appellant Mitchell, to fraudulently cloak his (Mitchell's) real interest in the property; that appellant Harris was and is the agent, tool and straw of appellant Mitchell, who has since his acquisition of said property expended large sums of his (Mitchell's) personal money in said property under the guise and pretext of loans to appellant Harris, who is and was financially embarrassed and who has never invested a penny of his own money in the property; that appellant Mitchell has consistently demonstrated his own personal and financial interest in the property by collecting rents, contracting utilities in his own name and by the ostensible advancement of huge sums of money to the notoriously impecunious co-appellant Harris; that the property is in fact the property of appellant Mitchell.

Thereafter, in furtherance of the scheme to harass and annoy the appellees, appellant Mitchell caused appellant bank to institute a suit in the Municipal Court for the District of Columbia, the same being Civil Action No. M15174-59 against these appellees, claiming an alleged deficiency in the amount of One Thousand Five Hundred Eighteen Dollars and Ninety Cents ($1,518.90); that after a protracted trial that cause was resolved against appellant bank, and during the course of said trial all of the disclosures enumerated in this statement were revealed.

As a result of the appellants' manipulations of the trust property to the damage of appellees, action was filed in the United States District Court for the District of Columbia by these appellees for damages for conspiracy in dealing with trust property for trustees' personal benefit. The jury in the Court below in this case returned a verdict in favor of the appellees, which verdict has not been challenged by these appellants, and judgment was entered thereon and appellants appealed the case from the United States District Court for the District of Columbia.

## STATUTES AND RULES INVOLVED

**Municipal Court Civil Rules**

> RULE 13(a), COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim, over which the Court has jurisdiction, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject matter of another pending action.

**District of Columbia Code**

> TITLE 11-755(a). The Municipal Court for the District of Columbia, as established by sections 11-751 to 11-754 shall consist of a criminal and a civil branch. The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the Police Court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof on the effective date of this Act and in addition the said court shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3,000 and, in addition, shall also have exclusive

jurisdiction of such actions against executors, administrators and other fiduciaries: PROVIDED, HOWEVER, That the United States District Court for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction. The court shall also have jurisdiction over all cases properly pending in the Municipal Court of the District of Columbia or the Police Court of the District of Columbia on the effective date of this Act.

TITLE 11-755(a), as amended September 14, 1961.

* * * * *

The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the police court of the District of Columbia or by the Municipal Court of the District of Columbia or the judges thereof on the effective date of this Act and in addition the said court shall have exclusive jurisdiction of civil actions in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorneys' fees, protest fees, and costs, does not exceed the sum of $3,000 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators, and other fiduciaries as well as of all crossclaims and counterclaims interposed in all actions over which it has jurisdiction, regardless of the amount involved: PROVIDED, HOWEVER, That the District Court of the United States for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction.

TITLE 11-755(a), as amended October 23, 1962. The District of Columbia Court of General Sessions, as established by this Act, shall consist of the criminal, civil, and small claims and conciliation, and domestic relations branches. The court and each judge thereof shall have and exercise the same powers and jurisdiction as were heretofore had or exercised by the Municipal Court for the District of Columbia or the judges thereof on the day before the effective date of this amendatory subsection, and in addition the said court shall have exclusive jurisdiction of civil actions commenced after the effective date of this amendatory subsection, including such actions against executors,

administrators and other fiduciaries, in which the claimed value of personal property or the debt or damages claimed, does not exceed the sum of $10,000 exclusive of interest and costs, and, in addition, shall have jurisdiction of all cross-claims and counter-claims interposed in all actions over which it has jurisdiction regardless of the amount involved: PROVIDED, HOWEVER, That nothing herein shall deprive the United States District Court for the District of Columbia of jurisdiction over counterclaims, cross-claims, or any other claims whether or not arising out of the same transaction or occurrence and interposed in actions over which the United States District Court for the District of Columbia has jurisdiction. The District of Columbia Court of General Sessions shall also have jurisdiction over all cases properly pending in the Municipal Court for the District of Columbia on the effective date of this amendatory subsection.

TITLE 11-756(b) The Municipal Court for the District of Columbia shall have the power and is hereby directed to prescribe, by rules, the forms of process, writs, pleadings and motions, and practice and procedure in such courts, to provide for the efficient administration of justice, and the same shall conform as nearly as may be practicable to the forms, practice, and procedure ~~now obtaining under~~ the Federal Rules of Civil Procedure. Said rules shall not abridge, enlarge, or modify ~~the~~ substantive rights of any litigant. After September 16, 1938, all laws in conflict therewith shall be of no further force or effect: PROVIDED, HOWEVER, That nothing in this section shall be construed to require any change in the existing rules, procedure, or practice now in effect in the small claims and conciliation branch of the presently constituted Municipal Court of the District of Columbia; nor shall this Act or any section thereof in any way repeal or modify the provisions of sections 11-801 to 11-820, establishing said small claims and conciliation branch.

## SUMMARY OF ARGUMENT

Appellees contend:

1. That the claim in issue does not constitute a compulsory counterclaim and therefore the ruling of Judge Tamm in the court below should be sustained. Municipal Court Civil Rule 13(a), Title 11-755(a) of the District of Columbia Code (1961), as amended.

2. That the allegations of the within complaint are in strict compliance with Rule 9(b), Federal Rules of Civil Procedure, Brady, et al. v. Games, 76 U.S. App. D.C. 47, 48, 128 F.2d 754, and the denial of appellants' motion to dismiss said complaint or in the alternative for summary judgment should be sustained.

3. That the appellees are entitled to maintain this action at law for damages. Sheridan, et al. v. Perpetual Building Association, et al., No. 17,651, ___ U.S. App. D.C. ___, decided August 8, 1963; Peterson v. Kansas City Life Insurance Co., 98 S.W. 2d 770, 108 ALR 583, 586, 588.

## ARGUMENT

### I. COMPULSORY COUNTERCLAIM

#### A. Municipal Court for the District of Columbia

The issue raised by appellants is whether the appellees are barred from prosecuting the within action due to their failure to file a counterclaim in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars in the prior suit in the Municipal Court for the District of Columbia (now the District of Columbia Court of General Sessions) entitled Industrial Bank of Washington v. Robert L. Evans, et al., Civil Action No. M15174-59.

Title 11-755(a) of the District of Columbia Code (1961) provides that the Municipal Court:

> "* * * shall have exclusive jurisdiction of civil actions, including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorney's fees, protest fees, and costs, does not exceed the sum of $3,000 * * *."
> (Emphasis supplied)

The Court being cognizant of the aforementioned jurisdictional limitation, its compulsory counterclaim Rule 13(a), of the Federal Rules of Civil Procedure, as required by Title 11-756(b) of the District of Columbia Code (1961), was significantly modified so as to comply with its jurisdictional limitation set forth in Title 11-755(a), supra. Thus, Rule 13(a) of the Municipal Court Civil Rules, the rule applicable to the issue raised herein, provides, inter alia, that a pleading shall state as a counterclaim any claim over which the court has jurisdiction.

It is to be noted that the Municipal Court of Appeals has had no difficulty with this issue and they have consistently ruled that the Municipal Court, during the period in question, could not entertain a counterclaim which involved a monetary amount in excess of the jurisdiction of the Court. In Hillyard v. Klein, D.C. Mun. App., 64 A.2d 659, the Court stated:

> "* * * In some classes of cases, such as suits for rent overcharges and actions transferred by the District Court, the jurisdiction of the Municipal Court is unlimited as to amount. However, its jurisdiction in tort and contract cases is limited to $3,000, and we are entirely clear that this limitation applies not only to the original claim but also to counterclaim and crossclaim." (Emphasis supplied) Also see Psarakis, et al., v. Dukane, Inc., D.C. Mun. App., 84 A.2d 543.

These cases discuss between them every conceivable situation or argument which these appellants could possibly raise, and it is crystal clear that appellees' claim in the amount of Two Hundred Fifty Thousand ($250,000.00) Dollars, obviously exceeding the jurisdictional limitation

of the Municipal Court, could not have been successfully asserted in the prior suit in the Municipal Court.

Further, as stated by Associate Judge Clagett in Hillyard v. Klein, supra:

> "Embarrassments sometimes resulting from just such jurisdictional conflicts were discussed in Geracy, Incorporated vs. Hoover, 77 U.S. App. D.C. 55, 133 F(2d) 25, 147 A.L.R. 185. The proper administration of justice obviously would be promoted by either giving the Municipal Court jurisdiction over such counterclaims or providing for the transfer of such cases to the District Court just as certain cases may now be transferred by the District Court to the Municipal Court. Such embarrassments, however, present legislative problems beyond the power of the courts to solve." (Emphasis supplied)

The soundness of the position taken by this Court in the Geracy case, supra, and by the Municipal Court of Appeals in the aforementioned cases is manifested in Public Law 87-242, #1, 75 Stat. 513, September 14, 1961, Title 11-755(a) of the District of Columbia Code (1961 Edition, Supplement I, 1962) wherein Congress subsequently saw fit to enlarge the jurisdiction of the Municipal Court to include "* * * all crossclaims and counterclaims interposed in all actions over which it (Municipal Court) has jurisdiction, regardless of the amount involved." (Parenthesis and emphasis supplied)

### B. United States District Court for the District of Columbia

The aforementioned statute, rule of Court and adjudicated cases clearly establishing the futility of appellants' contention concerning the filing of a counterclaim in the Municipal Court when said claim exceeds the jurisdiction of that Court, appellants now contend that the appellees were duty bound to have filed a suit in the U. S. District Court for the District of Columbia prior to judgment in the Municipal Court. In

support of this contention, appellants erroneously construed Title 11-755(a), supra, which provides:

> "* * * Provided, however, that the United States District Court for the District of Columbia shall have jurisdiction of counterclaims and crossclaims interposed in actions over which it has jurisdiction." (Emphasis supplied)

as granting to the U.S. District Court jurisdiction over all counterclaims and crossclaims in excess of Three Thousand ($3,000.00) Dollars interposed in actions before the Municipal Court and over which the Municipal Court has jurisdiction over the original action. Appellants state that, "This construction of the statute could not be otherwise because there would be no need of the 'Provided' section since the U.S. District Court for the District of Columbia already had jurisdiction of all civil cases where the sum in controversy was $3,000.00 or more."

However, appellants have taken this provision out of context and attempted to construe it in a vacuum. The first portion of this statute provides in part that the Municipal Court, "* * * shall have exclusive jurisdiction of civil actions, including counterclaims * * *, in which the claimed value * * * does not exceed the sum of $3,000 * * *." Congress saw fit to provide that the U. S. District Court shall have jurisdiction over certain counterclaims which may, because of the amount involved, normally come within the exclusive jurisdiction of the Municipal Court.

Therefore, a closer reading of this statute would clearly disclose that the U. S. District Court has jurisdiction over counterclaims and crossclaims interposed in those actions that are before the U. S. District Court, regardless of the amount of the counterclaim or crossclaim. Thus, if "A" files an action in the U. S. District Court claiming the amount of $250,000.00 and "B" files a counterclaim in the same Court in the amount of $50.00, the aforementioned provision of Title 11-755(a), supra, gives the U. S. District Court jurisdiction to hear "B"'s counterclaim. Any other construction would strip this provision of any meaning

since the amended provision, Public Law 87-242, #1, supra, which provides that the Municipal Court shall have jurisdiction over "* * * all crossclaims and counterclaims interposed in all actions over which it has jurisdiction, regardless of the amount involved: * * *," (Emphasis supplied), contains the identical provision of Title 11-755(a), supra, of which appellants contend required the appellee to file its counterclaim in the U. S. District Court because it exceeded the jurisdictional limitation of the Municipal Court. As noted in the amended provision, the jurisdictional limitation of the Municipal Court concerning counterclaims has been removed, yet this provision is still present. The later amendment, Public Law 87-873, #2, October 23, 1962, 76 Stat. 1171, Title 11-755(a) of the District of Columbia Code (1961 Edition, Supplement II, 1963) contains the following provision:

> "* * * Provided, however, that nothing herein shall deprive the United States District Court for the District of Columbia of jurisdiction over counterclaims, cross-claims, or any other claims whether or not arising out of the same transaction or occurrence and interposed in actions over which the United States District Court for the District of Columbia has jurisdiction." (Emphasis supplied.)

And, as previously stated, the Municipal Court's jurisdiction over counterclaims is now unlimited, thus negating any necessity for the U. S. District Court to be given jurisdiction over counterclaims exceeding the Municipal Court's jurisdiction. Yet, Congress saw fit to amend Title 11-755(a) twice and leave intact the provision which appellants erroneously construe as compelling appellees to file their counterclaim in the U. S. District Court. Thus, it should be obvious that this provision grants the U. S. District Court jurisdiction to hear counterclaims, crossclaims, etc., regardless of the amount involved when said claims are interposed in original actions presently before the U. S. District Court.

Even the cases cited by the appellants fail to support them in the position taken by them in this case. Nowhere is it even remotely suggested that because a person who has a claim and fails to file suit in the

District Court, where a case between the same parties is pending in the Municipal Court, he by so much is barred from proceeding in the District Court. The cases cited by the appellants do stand for the proposition that where the issue relied upon by the plaintiff in the District Court has been resolved against him in the lower Court he is estopped from proceeding in the District Court. This is a variation of the doctrine of res adjudicata.

As stated in 50 C.J.S. #681:

> "On the other hand, a judgment is not a bar to a subsequent suit by defendant on a cause of action successfully set up as a defense, but on which, owing to the state of the pleadings, no affirmative relief could be given to him in the former action." (Emphasis supplied)
>
> See Traylor v. Rogers, 104 Kans. 250, 178 Pac. 416.

Further,

> "And if the use of a matter defensively does not involve an assertion of it as a claim against the plaintiff but merely as a fact inconsistent with his alleged cause of action, a judgment sustaining the defense does not bar the subsequent use of the same facts as a ground of action. Hence the successful use of fraud as a defense to an action for the purchase price does not bar a subsequent action for damages caused by the same fraud." (Emphasis supplied) Freeman on Judgments, 5th Ed., Vol. 2, #792. See Lenderman Machine Co. v. Hillebrand Co., 75 Ind. App. 111, 127 N.E. 813.

See also a most informative treatment of this subject in an article by Scott, entitled "Collateral Estoppel by Judgment," 56 Harvard L. Rev. 1, 28, where it was stated:

> "On the other hand, if the patient interposes a defense which is litigated and determined by the judgment, the judgment is conclusive as to the matter litigated. If the patient resists the claim on the ground of the negligence of the physician, and it is found that he was not negligent and judgment is given for the physician, the patient cannot recover for the harm since the

> absence of negligence is conclusively established. If on such an issue judgment is given for the patient, he is not precluded from bringing an action for mal-practice; and in such action the negligence of the physician will be treated as conclusively established, although the physician may interpose any other defenses he may have. The patient is not splitting his cause of action by using the fact of the physician's negligence as a defense in the first action and as a claim in the second action." (Emphasis supplied)
>
> "It has been uniformly held, sometimes in reliance upon express statutory provisions, that a defendant's failure to interpose a counterclaim which the court can not entertain for lack of jurisdiction of the subject matter does not result in a loss of the counter-claim, as where the defendant fails to interpose a counter-claim in excess of the amount limiting the court's jurisdiction or a counter-claim for the unliquidated damages." 30A AM JUR #389.

The appellees stand in this position is that they had a cause of action at the time of the filing of the Municipal Court action by the appellant Industrial Bank, as the plaintiff therein. The statute creating the Municipal Courts, the Rules of the Municipal Court and the decisions of the Municipal Court of Appeals, and the United States Court of Appeals, all excluded the appellees' claim as one which could be litigated in the Municipal Court. In this posture of the case the appellees had no statute, nor rule of Court, and no adjudicated cases requiring them to file a suit at any particular time. There are two matters exclusively within the competence of the appellees, his choice of forum and his timing of the law suit, with only the rule of the compulsory counterclaim affecting his timing and ultimately the Statute of Limitations.

## II. MOTION FOR LEAVE TO AMEND PLEADINGS--Rule 15(a) F.R.C.P.

The issue herein is not whether the practice is to permit amendments freely but whether (1) appellants are to be permitted to collaterally attack a prior ruling of the U. S. District Court; and (2) the

U. S. District Court is required, under the Federal Rules of Civil Procedure, Rule 15(a), to grant an amendment which amendment, in and of itself, is legally insufficient.

**A. Collaterally Attack Prior Ruling**

Appellants alleged in their answers (J.A. 5, 8, 11 and 13) that appellees' present claim is based on the transactions and occurrences which constituted the subject matter of the claim involved in the Municipal Court for the District of Columbia, Civil Action No. M15174-59, and therefore constituted a compulsory counterclaim. Appellees moved the Court to strike from appellants' answers all defenses based on an alleged compulsory claim (J.A. 16) which motion was granted.

The attempt, under the present posture of this case, as disclosed by the record, to file the Amended Answers proposed was a collateral attack upon the ruling of Judge Tamm in striking the defense #2 of the defendants (appellants herein) #1, #2, and #3 and certain parts of the answer of the defendant (appellant herein) #4 (J.A. 24). Even the most casual reading of the proposed answer will disclose that the proposed answer attempted to set up as a defense the so-called "compulsory counterclaim" theory which was effectively disposed of by Judge Tamm in his ruling on the 21st day of July, 1961.

The appellants in identical proposed Amended Answers stated in paragraph 3 of the aforementioned Amended Answer:

> "3. Plaintiffs' within claim arises out of the transaction or occurrences that was the subject matter of said prior Municipal Court action and as such was a compulsory counterclaim, * * *."
> (Emphasis supplied)

The precise question, i.e., whether the cause of action prosecuted herein was indeed a compulsory counterclaim which had to be litigated under the compulsory counterclaim rule of the Municipal Court was the question which Judge Tamm settled by his ruling of July 21, 1961. The

very language of the order of Judge Tamm in granting appellees' motion to strike provided, among other things:

> "Ordered, that so much of paragraph #8 of the Second Defense of defendant #3 as relates to the alleged failure to file a compulsory counterclaim be, and the same is also stricken from the answer of the aforesaid defendant #3." (Emphasis supplied)

Thus, it can be seen that the attempt to file the proposed answer was an ingenuous, but specious attempt to evade the consequences of Judge Tamm's order collaterally and not by appeal.

**B. Amendment Legally Insufficient**

The Court is not required, under the Federal Rules of Civil Procedure, to grant an amendment which amendment, in and of itself, is legally insufficient. As set forth in the ARGUMENT, I, B, herein, which is incorporated herein by reference, neither statute, rule of Court, nor adjudicated cases required the filing of a counterclaim in the U. S. District Court while the original claim was pending in the Municipal Court and/or prior to judgment in the Municipal Court. Therefore, the proposed amended defense, that appellees were duty bound to file a counterclaim in the U. S. District Court for the District of Columbia, was legally insufficient on the record before the Court and the Court being aware of this properly denied the appellants' motions to amend. As stated in Canister Co., Inc. v. National Can Corporation, 6 F.R.D. 613, 614:

> "* * * True, under Rule 15(a), * * * amendments are granted with great liberality. Nevertheless, a court will never grant an amendment which seeks to add a defense which is obviously insufficient for the purpose for which it is offered." (Emphasis supplied)

## III. MOTION TO DISMISS THE COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

> "Motions to dismiss are not favored, and every fair intendment should be drawn in favor of the pleader. On the motion every fact well pleaded must be treated as admitted. (cases cited) * * * Unless it appears to a certainty that the plaintiff is entitled to no relief on the stated facts which could be proved, the complaint must be sustained. (cases cited)." United States v. Cattaraugus County, U.S. Dist. Ct. W.D., N.Y., 67 F. Supp. 294, 298. Also see Mull v. Colt Co., Inc., U.S. Dist. Ct. S.D., N.Y., 31 F.R.D. 154, 162.

This Court held in Mayflower Hotel Stock P.C. v. Mayflower Hotel Corp., 84 U.S. App. D.C. 275, 277, 282, 173 F.2d 416, that:

> "Of course, on motion to dismiss all facts properly pleaded are taken as admitted."

### A. Res Adjudicata

Appellants contend that the allegations set forth in the complaint herein are the same facts put in issue as a defense in said Municipal Court action, Civil Action M15174-59, and the same are res adjudicata.

Appellants misconceive the distinction between the doctrines of res adjudicata and collateral estoppel by judgment. Where,

> "* * * the use of a matter defensively does not involve an assertion of it as a claim against the plaintiff but merely as a fact inconsistent with his alleged cause of action, a judgment sustaining the defense does not bar the subsequent use of the same facts as a ground of action. Hence the successful use of fraud as a defense to an action for the purchase price does not bar a subsequent action for damages caused by the same fraud." (Emphasis supplied) Freeman on Judgments, supra; Lenderman Machine Co. v. Hillebrand Co., supra.

In this instance, all matters concerning this issue which have been previously discussed in this brief — see Section I, B — are incorporated herein by reference.

In Great Atlantic and Pacific Tea Co. v. West, 56 App. D.C. 103, 10 F. 2d 898, cited by appellants, Great Atlantic brought suit against Welte, and others, in the Supreme Court of the District of Columbia for violation of a covenant in a lease. The Court entered a final decree against Great Atlantic and Great Atlantic appealed to this Court, which appeal was voluntarily dismissed. Welte, who was still the owner of the property, brought an action in the Landlord and Tenant Branch of the Municipal Court against Great Atlantic to recover possession of the premises. Great Atlantic defended on the ground that it was released from the obligation to pay rent under the lease, owing to the violation by the lessor of the restrictive covenant contained in its lease. The Municipal Court entered judgment against Great Atlantic.

The Court properly applied the doctrine of res adjudicata in barring Great Atlantic from attempting to relitigate the issues decided against it. Based upon this case, appellant bank, in the present case, is collaterally estopped from raising any issue, including their claim of deficiency, since this matter was litigated in said Municipal Court action and a verdict was rendered against appellant bank. Further, the doctrine of res adjudicata is not available to the other appellants since they were not parties in the earlier action, and additionally since, as set forth in this brief — Sections I, A and I, B — incorporated herein by reference, the Municipal Court did not have jurisdiction over appellees' claim of $250,000.00 and, therefore, said claim could not have been litigated against these appellants.

### B. Rule 9(a), Federal Rules of Civil Procedure

Appellants allege that the complaint herein failed to comply with Rule 9(a), Federal Rules of Civil Procedure, in that the circumstances constituting fraud were not stated with particularity.

Appellees in their complaint (J.A. 1), inter alia, identified the property, set forth the names of the trustees and the duties of said trustees, and alleged that:

> (1) B. Doyle Mitchell, trustee and appellant herein, did collude, conspire, contrive and combine wickedly and fraudulently with Waddell R. Thomas and Robert M. Harris, appellants herein, with the full knowledge and acquiescence of the Industrial Bank of Washington, appellant herein, to get control of and ownership of the property described in the complaint for the trustee's own personal use and profit.
>
> (2) In furtherance of said conspiracy, the trustee foreclosed on said property and purported to sell said property to appellant Thomas without a deposit, which was in violation of the published terms of said sale, and that the alleged sale to the said Thomas was not a bona fide sale, but was a device or scheme whereby the said Mitchell was in fact and in truth acting for himself in violation of his obligations as trustee and in violation of law.
>
> (3) The said Mitchell caused the appellees' property to be deeded to the said Thomas, in fee simple, without the aforesaid Thomas investing a solitary penny.
>
> (4) In furtherance of this preconceived fraudulent scheme, the said Mitchell, still conspiring with the said Thomas, conspired with appellant Robert M. Harris, and caused the said Harris to be substituted as owner of the appellees' property in place and stead of the said Thomas, who refused even to pay the settlement charges incurred as a result of his alleged purchase of the property. These charges were paid by the appellant Industrial Bank of Washington.
>
> (5) The transfer to the said Harris was a scheme and deceptive device used by the said Mitchell to fraudulently cloak his (Mitchell's) real interest in the property.
>
> (6) In furtherance of the aforesaid scheme, the said Mitchell has expended large sums of his own personal money in said property under the guise and pretext of loans to the said Harris, who is and

> was financially embarrassed and who has never invested a penny of his own money in the property.
>
> (7) The said Mitchell has consistently demonstrated his own personal and financial interest in the property by collecting rents, contracting utilities in his own name and by ostensible advancement of huge sums of money to the notoriously impecunious co-appellant Harris.
>
> (8) In furtherance of this scheme the trustee caused appellant bank to institute suit against the appellees for an alleged deficiency which cause was resolved against the appellant bank and all of the disclosures enumerated in the complaint were revealed.

It is hardly conceivable that the circumstances constituting fraud in this case could have been stated with any more particularity than as shown above.

This Court stated in Brady, et al. v. Games, 76 U.S. App. D.C. 47, 48, 128 F.2d 754, that:

> "Appellants say that appellee did not sufficiently allege or prove either consideration for the agreement or fraud in the transfer. The complaint set forth the agreement in full, and also alleged that the deceased 'conveyed all his property, real and personal, to-wit (a certain lot) to defendant, Anne J. Brady, his wife, for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness' under the agreement. We think this was sufficient. It is not clear how 'the circumstances constituting fraud' could have been stated with substantially greater particularity without improperly pleading items of evidence. (ff. Appellants do not contend that they were prejudiced, through surprise or otherwise, by lack of particularity. It follows that they were not prejudiced by denial of their motion for a bill of particulars.)" (Emphasis supplied) Also see McGee v. Welch, 18 App. D.C. 177, 178, 185; Page v. Comert, et al., 100 U.S. App. D.C. 139, 243 F.2d 245.

Rule 84, Federal Rules of Civil Procedure, states that:

> "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate

> the simplicity and brevity of statement which the rules contemplate. * * *."

The Appendix of Forms, supra. Form 13, Complaint on Claim for Debts and to Set Aside Fraudulent Conveyance under Rule 18(b) sets forth an example of an allegation of fraud as follows:

> "4. Defendant C.D. on or about _____ conveyed all his property, real and personal (specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to."

In a stockholders' derivative action complaint, alleging conspiracy to secure corporation for a defendant by illegal means and to assist the defendant in acquisition of the corporate stock held by minority stockholders at a manipulated price, by misrepresenting the price by the defendant to another with intent to induce minority stockholders to sell at such false price and to assist defendant in exercising its control fraudulently by operating the corporation for the defendant's benefit, this Court held the complaint stated a cause of action. Mayflower Hotel Stock P.C. v. Mayflower Hotel Corp., supra. Also see MacLeod, et al. v. Cohen-Erichs Corp., Dist. Ct. S.D., N.Y., 28 F. Supp. 103, 104, 105.

> "* * * the function of pleadings under the Federal Rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial. It has been held that a generalized summary of the case affords fair notice and that is all that is required." (cases cited) Mueller v. Rayon Consultants, Inc., et al., U.S. Dist. Ct., S.D., N.Y., 170 F. Supp. 555, 558.

## C. Damages for Fraud or Deceit

Appellants state in their brief, page 19:

> "Assuming that the defendant Mitchell indirectly purchased the security property, this is not a willful tort within the meaning of the rule as laid down by the courts. There is no actual fraud."

However, a cursory review of the complaint will reveal that the conduct of the sole trustee and appellant herein, B. Doyle Mitchell, in dealing with the trust property was such that the only reasonable conclusion that could be arrived at was his intent to deceive the appellees by purchasing the trust property for his own benefit through straw parties, viz., Waddell R. Thomas and Robert M. Harris, appellants herein, with full knowledge and acquiescence of the appellant bank. No one knew as well as the trustee the value of this property; upon acquiring this property, the trustee contracted utilities in his own name; collected the rents from the property, etc., all of this the trustee did through straws and concealment, as detailed in the complaint, for the sole purpose of preventing the appellees from realizing that he had, in fact, violated his trust. The whole transaction gives conclusive evidence of the overwhelming influence the trustee had in the course of this conspiracy and it is clear that the final consummation was in his hands at all times. The law would be impotent if, under these facts as the jury so found, the trustee were permitted to purchase this property for his own benefit and that the trustee and the other appellants not be liable in an action of fraud for the damages resulting therefrom. Appellees had a right to rely upon and assume, and they did rely upon and assume, that the trustee herein would faithfully execute this trust as the law requires and not through devious means conceal the fact that he was dealing in this property for his own benefit. As a result of his conduct, the trustee, B. Doyle Mitchell, violated the trust and confidence reposed in him, thus rendering himself and the other appellants liable for damages resulting therefrom, based on constructive fraud.

As stated in 26 C.J. 1061 #4:

> "Constructive fraud is a breach of legal or equitable duty which,irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an

> essential element of constructive fraud. An intent to deceive is an essential of actual fraud."

Further, as stated by Justice Robb in Holman v. Ryon, et al., 61 U.S. App. D.C. 10:

> "Trustee may not deal in trust property for own benefit. It is a wholesome doctrine, based upon reasons of public policy, that a trustee may not purchase or deal in trust property for his own benefit or on his own behalf, directly or indirectly."

It is to be noted that appellants have not questioned the jury's verdict, although the jury found that this fraudulent, preconceived scheme was not only planned, but was, in fact, carried out by these appellants.

**D. Alleged Default of Monthly Payment**

The issue concerning an alleged default of monthly payments on the secured obligation to appellant bank, which issue is raised continuously throughout appellants' brief, is without merit.

Appellants concede that appellant bank brought an action in the Municipal Court, Civil Action No. M15174-59, for an alleged deficiency, and that a verdict was rendered against appellant bank on this precise issue. Further, appellant bank did not appeal from this verdict and has never alleged that the verdict was contrary to the evidence. Thus, it is axiomatic that appellants are barred from relitigating this issue and the discussion concerning the doctrine of res adjudicata and collateral estoppel, set forth herein — Sections I, B and III, A — incorporated herein by reference, are applicable to this situation.

## IV. PLAINTIFFS ARE ENTITLED TO MAINTAIN THIS ACTION AT LAW FOR DAMAGES

Appellants contend that where there is a rightful foreclosure of the property, albeit improperly executed, involving fraud, conspiracy and breach of trust on the part of appellants, the only remedy available to appellees is to have the sale set aside. In support of their contention, appellants "strongly rely upon" the case of Peterson v. Kansas City Life Insurance Company, 98 S.W. 2d 770, 108 A.L.R. 583, 586, 588, wherein the Court stated:

> "The theory upon which the case was tried is thus stated in plaintiff's reply brief: 'The case was not tried, by either party, on the theory of fraud.' * * * (We take it that plaintiff means to make no claim of prior fraudulent intent on the part of defendant. * * *) (Emphasis supplied)
>
> * * * *
>
> "Plaintiff cites no case which holds, at least in the absence of a preconceived plan to carry out a fraudulent purpose, a mere improper execution of a rightful foreclosure is ground for relief by the mortgagor against the mortgagee except in equity." (Emphasis supplied)

In view of the fact that appellants "strongly rely upon" this case, it must be assumed that appellants likewise concede that where there is a preconceived plan to carry out a fraudulent purpose plaintiffs are entitled to maintain this action at law.

It is extremely significant to recognize the fact that the very heart of the appellees' complaint is that appellants, as a result of a fraudulent, preconceived scheme, not only planned, but carried out, this scheme for the sole purpose of getting control of, and ownership of, the appellees' property for the trustee's personal use and benefit.

It is also extremely significant, at this point, to recognize the fact that appellants have never alleged that the jury's verdict was contrary to the evidence.

Therefore, in view of the appellees' complaint and the evidence adduced at the trial, the jury's verdict which at no time was questioned by the appellants, the Peterson case, supra, resolves this issue against appellants without further discussion, since by necessity, the jury found as a fact that as a result of a fraudulent, preconceived scheme the appellants not only planned, but carried out, this scheme for the sole purpose of getting control of, and ownership of, and did get, in fact, control of, and ownership of, the appellees' property for the trustee's personal use and benefit.

However, this Court recently discussed this matter in Sheridan, et al. v. Perpetual Building Association, et al., No. 17,651, ___ U.S. App. D.C. ___, decided August 8, 1963. In the Sheridan case, supra, as in the present case. the cestui que borrower became delinquent in his payment of installments on a note secured by a deed of trust. The trustees, as in the present case, held a foreclosure sale. Scrivener, one of the trustees in the Sheridan case, supra, was an officer and director of Perpetual, the note holder. Crowell, the other trustee in Sheridan, supra, managed Fidelity Investment Company, which was owned and operated by the partners who were the directors of Perpetual for their individual profit. In the present case, the trustee, B. Doyle Mitchell, is the Chief Executive Officer, Managing Director, and President of the appellant bank, the note holder. And in the Sheridan case, supra, as in the present case, the cestui que borrower sued the lender and the trustees for damages. Up to this point, the two cases are identical. However, after this point, the present case comes within the trial judge's statement in what later transpired:

> "* * * could be picked up to just blast this whole system * * *."

The following transpired:

> a. In the Sheridan case, supra, the trustees sold the property, after receiving the cash deposit, to a disinterested purchaser.

The trustee, in the present case, sold the property to appellant Waddell Thomas (Tr. 204 and 298), the agent, tool, and straw of the trustee, who failed to put up any cash deposit (Tr. 204, 297, 309), although the published terms of sale required cash (Tr. 202, 297,309). At no time from the date of the sale (title passed to appellant Thomas on December 11, 1958 (Tr. 299)), up to settlement, had appellant Thomas paid one solitary penny (Tr. 205, 309).

b. Upon default in the Sheridan case, supra, the trustees released the purchaser upon his forfeiting his deposit, this being done without consulting with the cestui que borrower and without exercising the alternative remedies provided by the terms of sale against defaulting purchaser. This Court did not look with favor upon this type of action by the trustees.

In the present case, the trustee permitted appellant Thomas to renounce the sale (Tr. 206, 207, 301) all without the knowledge of the cestui que borrowers, and the appellant bank paid the expenses, incident to the sale, since appellant Thomas had refused to pay them (Tr. 207, 208, 307). Subsequently, the trustee permitted the substitution of appellant Robert M. Harris, the agent, tool, and straw of the trustee, in the place and stead of appellant Thomas, without so much as making a financial verification of appellant Harris's ability to fulfill the obligations of a purchaser (Tr. 228, 229), but, on the contrary, having full knowledge of the appellant Harris's financial irresponsibility. All the foregoing was done without consulting with the cestui que borrowers. Appellant Harris was notoriously impecunious at the time of this substitution (Tr. 323, 324, 325, 332-335), and has never invested one penny of his own money in this property (Tr. 230). The trustee has consistently demonstrated his own personal and financial interest in this property by collecting rents, contracting utilities in his own name and by the ostensible advancement of huge sums of money to the appellant Harris to use for repairs on this property (Tr. 230, 232, 334-338).

c. As a result of the trustees' breach of trust in the Sheridan case, supra, this Court stated:

> "We think * * * that the trustees, in disregard of their duty to Sheridan, acted in a manner adverse to his interest, and that therefore they are liable in damages for the loss he suffered * * *."

> Likewise, in the present case, the trustees, in disregard of his duty to the Evanses acted in a manner most adverse to the Evanses, as well as the public, and appellant bank, Thomas, and Harris, who aided and abetted in this preconceived, fraudulent scheme, are all liable in damages for the loss suffered by the Evanses.

Appellees' property was a commercial piece of property valued at Forty Thousand ($40,000.00) Dollars. Appellants, B. Doyle Mitchell and the Bank, had this property appraised twice, once before the foreclosure sale here in question, and once after the foreclosure sale, and on each occasion they appraised this property at Twenty-five Thousand ($25,000.00) Dollars (Tr. 209, 212, 215).

As a result of the aforementioned preconceived, fraudulent scheme, which was planned and carried out by these appellants, this property was purchased by the trustee, through his agents, tools, and straws, at the low price of Twelve Thousand Five Hundred ($12,500.00) Dollars, which is one-half (1/2) of the value that the appellants themselves appraised this property. Therefore, appellees sustained compensatory loss, based on appellants' appraisal, of Twelve Thousand Five Hundred ($12,500.00) Dollars, and, based on appellees' appraisal of this property at Forty Thousand ($40,000.00) Dollars, their loss was Twenty-seven Thousand Five Hundred ($27,500.00) Dollars.

In addition, the appellees are entitled to punitive damages in this type of case. As was so eminently stated by Circuit Judge Burger of this Court in Brown v. Coates, 102 U.S. App. D.C. 300, 253 F.2d 36:

> "When one is commissioned by, or holds himself out to, the community to perform special services which may be engaged for hire by others in the conduct of their personal or business affairs, such

> as lawyers, trust companies, realtors, or the like, such persons inescapably assume certain fiduciary responsibilities. The community in turn has a broad public interest, as a matter of public policy, in how such persons conduct their relations with those who place trust in them. Sometimes that public policy is expressed in terms of specific regulatory statutes with penal sanctions, sometimes by the courts and professional associations in disciplinary actions. In this case we express the broad public policy by the imposition of punitive damages. Punitive damages are particularly apt in such circumstances because they both punish the wrongdoer, and offer the wronged a greater incentive to bring derelicts to justice, a process which can subject the victim to considerable expense and trouble." (Emphasis supplied)

## CONCLUSION

In view of the foregoing, it is respectfully submitted, therefore, that the appeal herein is wholly without merit, and should be dismissed.

Respectfully submitted,

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